# REPORTS OF CASES

DECIDED BETWEEN
DECEMBER 1, 1951 AND JUNE 20, 1952

IN THE

# Supreme Court of Nebraska

SEPTEMBER TERM 1951 AND JANUARY TERM 1952

## VOLUME CLV

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WALTER D. JAMES
OFFICIAL REPORTER

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CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

## SEPTEMBER TERM, 1951

ARNOLD J. ANDERSON ET AL., APPELLEES, V. ANNA M. ANDERSON ET AL., APPELLANTS.
50 N. W. 2d 224

Filed December 7, 1951. No. 33039.

1. **Pleading: Trial.** A motion for judgment on the pleadings admits the facts well pleaded in the pleading of the adversary and all reasonable inferences resulting from them, but does not admit conclusions contained therein. It concedes that the allegations of the pleading of the litigant making the motion which are controverted by the pleading of the adversary are untrue.
2. **Evidence.** The general rule is that, while the court will take judicial notice of its records, it will not in one case take such notice of the record in another case.
3. ———. The doctrine that the court will take judicial notice of a final order made by it in another case which is so interwoven and interdependent with the pending case as to justify the application of it is an exception to the general rule, recognized by the necessity of giving effect to a former holding which finally decided questions of fact and law.
4. **Judgments.** All matters in issue in a former action and judicially determined are conclusively put at rest by a judgment therein and may not again be litigated in a subsequent action.
5. ———. The plea of res judicata applies, except in special cases, not only to points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties might have brought forward therein.
6. **Actions.** A litigant may not split a cause of action. If he might have had complete relief in an action which was prosecuted to final judgment, he may not again vex his adversary with another suit based on the same wrong.

7. **Judgments.** A litigant may not present an issue for determination and avoid the effect of an adjudication or estoppel by withholding proof thereof.
8. **Pleading.** Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or a matter to avoid, will be treated as admitted, though the answer also contains his general denial.

APPEAL from the district court for Burt County: JACKSON B. CHASE, JUDGE. *Affirmed.*

*Eugene D. O'Sullivan, Fred Jack,* and *John A. McKenzie,* for appellants.

*Swenson, Viren & Turner,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an action for partition of the northwest quarter and the north half of the southwest quarter of Section 19, Township 22 North, Range 10 East of the 6th P. M., Burt County, Nebraska. The pleadings at the time of the entry of decree were the amended and substituted petition of appellees, the answer of appellants, and the motion for judgment on the pleadings made by appellees. The basis of the motion, as stated therein, was that the matters pleaded in the answer had been previously adjudicated by this court adversely to appellants and that they were barred and estopped from interposing them as a defense. The case was submitted to the district court. It found that the motion should be sustained and it rendered a decree of partition of the land. Appellants by this appeal seek a reversal of the decree.

The substance of the petition, so far as necessary to be stated herein, was that: The land was conveyed by warranty deed in fee simple to Charles P. Anderson and his son, Elmer S. Anderson, as tenants in common, to each an undivided one-half thereof. Charles P. Anderson died intestate and left surviving him his heirs

Caroline Anderson, his widow, Elmer S. Anderson, Arnold J. Anderson, Harry R. Anderson, and Clarence A. Anderson, his sons. Clarence A. Anderson and Josie Anderson, his wife, conveyed their interest in the land to Caroline Anderson. Elmer S. Anderson died intestate leaving surviving him his heirs Anna M. Anderson, his widow, Lucile Marie Thorndyke, Gladys Bernice Jack, Clifford E. Anderson, Charles T. Anderson, and Roy I. Anderson, his children. Caroline Anderson died testate. Her will was admitted to probate. She was seized of an undivided one-fourth of the land. She devised her interest in the north half of the northwest quarter of said Section 19 to Clarence A. Anderson, and she devised her interest in the south half of the northwest quarter and the north half of the southwest quarter of Section 19 to the children of Elmer S. Anderson, deceased. The appellees Arnold J. Anderson, Harry R. Anderson, and Clarence A. Anderson, sons of Charles P. Anderson, and appellants Anna M. Anderson, Lucile Marie Thorndyke, Gladys Bernice Jack, Clifford E. Anderson, Charles T. Anderson, and Roy I. Anderson, widow and children of Elmer S. Anderson, deceased, were the owners as tenants in common of the land, and the share of each was specifically alleged. The history of, proceedings had, and the decree rendered in a suit to quiet title to the land brought and prosecuted by the appellants above named against the appellees named above and Josie Anderson, the wife of Clarence A. Anderson, in the district court for Burt County, Nebraska, and the fact that an appeal was prosecuted from the decree and a final determination made by this court adverse to the claims and contentions of the appellants, were alleged and set forth, including allegations concerning the pleadings in the district court, a copy of the decree rendered therein, and a copy of the opinion and decision of this court. Appellees asked for a partition of the land.

The parts of the answer important to a determination

of the appeal are: A denial of the allegations of the petition, except an admission that the warranty deed by which the land was conveyed named Charles P. Anderson and Elmer S. Anderson as grantees, and that the deed was recorded in the office of the register of deeds of Burt County, Nebraska, on March 8, 1920; the allegations therein that Elmer S. Anderson on May 23, 1919, purchased the land and agreed to pay therefor $67,900, and that he during his lifetime and appellants thereafter have paid all of the purchase price except $11,000 represented by a mortgage on the land; that Elmer S. Anderson took possession of the land on the 4th day of March 1920, and thereafter had until his death on the 22d day of March 1940, continuous, exclusive, notorious, and adverse possession thereof, and after his death appellants continued and had like possession and occupancy of said premises until the time of the filing of the answer, and by virtue thereof they were the absolute owners of all of the premises and were in the actual and exclusive possession thereof; that appellees, or any of them, have no right, title, or interest in or to any part of the land, and they, or any of them, have not been in the possession thereof; that an appeal was taken to this court from the decree rendered in the suit to quiet title by the district court, and that the decree was reversed and the case dismissed by this court for the reason that the evidence of plaintiffs in the suit to quiet title (who are the appellants in the pending case) was insufficient to sustain the cause of action to quiet title or the decree rendered by the district court, and that no other matter, question, or issue was considered or determined by this court in the suit to quiet title; and that this court in its opinion or its decision in that case did not determine that appellees in this case were the owners of any part of said property, or were at any time in the possession thereof, or that they ever had any interest of any kind or nature therein. The prayer of the answer was that the court find and

adjudge that appellees have no right, title, or interest in or to the land, and that the partition action be dismissed.

The motion of appellees for judgment on the pleadings admitted the truth of the facts well pleaded in the answer of appellants, and all inferences reasonably drawn therefrom. It did not admit conclusions stated in the answer. It conceded the untruth of the allegations of the petition insofar as they were controverted by the answer. If upon the pleadings appellees were entitled by law to judgment in their favor, the motion was properly granted and a decree was justifiably entered. Gilbert v. First National Bank, 154 Neb. 404, 48 N. W. 2d 401; International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N. W. 2d 620; Meyer Bros. Drug Co. v. Hirsching-Morse Co., 94 Neb. 309, 143 N. W. 206.

Obviously the correctness of the action of the district court turns on whether or not this court in the prior suit by appellants against appellees for a decree quieting title to the land in appellants adjudicated adversely to them the matters alleged in the answer in this case as a basis for their claim that they are the owners of the land subject only to the mortgage thereon.

Reference is made by statements in the pleadings of the parties to the former action to quiet title, to matters involved therein, the action taken by the district court, the final result of the case as shown by the opinion and decision in this court, and the respective claims of the parties as to the effect thereof on this case. The situation makes appropriate a resort to the doctrine that this court will take judicial notice of a final order made by it in another case which is so interwoven and interdependent with the pending case as to justify the application of the rule. It is an exception to the general rule that the court will not ordinarily take judicial notice of the records in another case, recognized by the necessity of giving effect to a former holding which finally decided questions of fact and law. Witzenburg v. State, 140

Neb. 171, 299 N. W. 533; In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923; Glissmann v. Orchard, 152 Neb. 500, 41 N. W. 2d 756.

The deed referred to and relied upon in the suit to quiet title, by which the land was conveyed and in which Charles P. Anderson and Elmer S. Anderson were named as grantees, was recorded on March 8, 1920, and the recited consideration was $67,900. The date of the contract by which it was claimed in that case that Elmer S. Anderson bought the land was May 23, 1919. These facts identify the contract, deed, and transaction under and by virtue of which appellants claim title to the land in the partition case. The record title as alleged and shown in the first case from March 8, 1920, until the time of the decree in the district court in that case, except as affected by the death of Charles P. Anderson and Elmer S. Anderson, the administration of their estates, the death of Caroline Anderson and the probate and provisions of her will, and the deed from Clarence A. Anderson and his wife to Caroline Anderson, was identical with the record title asserted in the present record. Appellants alleged in the former case that Elmer S. Anderson purchased the land by contract of May 23, 1919, under which it was conveyed to him and his father, Charles P. Anderson, as grantee; that Elmer S. Anderson paid or secured the entire purchase price; that his father paid no part of it but did make loans, the proceeds of which were applied by the son on the purchase price; and that the father did not acquire or have any ownership of the land or any part of it. The basis of the claim of appellants in that case was amended by asserting that the father was to loan his son Elmer S. Anderson such amounts as he desired to use in his business, and that the father was named as one of the grantees in the deed to secure the repayments of the loans to him. It was also claimed by appellants in the first case that any claim of ownership of the land or any part of it made by appellees through and as heirs of their father, Charles

P. Anderson, was barred by the statute of limitations and adverse possession of the land since 1920 by Elmer S. Anderson and his wife and children. Anderson v. Anderson, 150 Neb. 879, 36 N. W. 2d 287.

In this case appellants claim and plead, as they did in their former action involving the land, that Elmer S. Anderson bought it on May 23, 1919, for $67,900, and that he and appellants paid all of the purchase price except $11,000, represented by a mortgage on the land, but the deed of the land was made to Charles P. Anderson and Elmer S. Anderson as grantees and was recorded on March 8, 1920; that Elmer S. Anderson took possession of the land on March 4, 1920, and had and continued open, exclusive, hostile, and adverse possession of it from then until his death on March 22, 1940; and that appellants continued such occupancy and possession thereafter and they became and are the absolute owners of the whole of the land, subject only to the mortgage thereon, and appellees, or any of them, have no interest in or title to any part of the land.

It thus affirmatively and definitely is shown that the over-all contention in the suit to quiet title to the land and in this partition action was and is the ownership of the land, and that in each the claim of ownership of the land made by appellants is based upon the ownership of the land by Elmer S. Anderson in his lifetime by purchase and by adverse possession, the fact of his death, and that they succeeded to his rights in the land as heirs. Specifically appellants have attempted in each of the actions to put in issue two questions of fact: One, concerning the original purchase of the land and the nature of the deed conveying it to Charles P. Anderson and Elmer S. Anderson; and the other, ownership of the land by Elmer S. Anderson by adverse possession. These questions were both adjudicated adversely to appellants in the suit to quiet title. Anderson v. Anderson, *supra*. That determination is not only final and binding upon

everyone involved in the present case, but also upon this court.

It has often been said and has recently been repeated by this court in Baum v. McBride, 152 Neb. 152, 40 N. W. 2d 649, that: "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action." See, also, Nelson v. Nelson, 152 Neb. 741, 42 N. W. 2d 654; Callahan v. Prewitt, 143 Neb. 793, 13 N. W. 2d 660; Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108.

An adjudication by this court extends to all matters decided expressly or by necessary implication and not alone to the questions actually and formally presented but to all existing in the record and necessarily involved in the decision. Kuhns v. Live Stock Nat. Bank, 138 Neb. 797, 295 N. W. 818. A litigant, if he might have had all of the relief he seeks in an action he has brought and prosecuted to final judgment, may not again vex his former adversary with another suit based on the same wrong. If a matter becomes the subject of litigation and is adjudicated, the law requires the parties to bring forward their whole case and will not generally permit the same parties to open the same subject of litigation in respect to a matter which might have been brought forward as a part of the subject contested but which was omitted as a part of the case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. A litigant may not be permitted to split a cause of action or present an issue for determination and avoid the effect

of an estoppel by withholding proof of it. Boomer v. Olsen, 143 Neb. 579, 10 N. W. 2d 507; Williams v. Beckmark, 150 Neb. 100, 33 N. W. 2d 352; Pettijohn v. County of Furnas, 150 Neb. 736, 35 N. W. 2d 828.

The incidence that the first suit was to quiet title to the land and the pending case is for partition of the land is unimportant. An issue, pleaded as title by adverse possession was in the former case, is not immune to the adjudication made in the case by the withholding or absence of proof supporting the issue, nor does the fact that there is only a mere mention of an issue in the opinion or decision of the court affect the determination of the issue by the decision made in the case. In Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. S. R. 44, this court said: "A party may not present issues for determination and avoid the effect of an estoppel by withholding proof thereof. * * * Therefore, where a plaintiff alleges several facts, the proof of any one of which entitles him to judgment, and there is a general finding against him, it will be conclusively presumed that each fact so averred was determined against him." See, also, Williams v. Beckmark, *supra;* Shepard v. City of Friend, *supra;* State ex rel. Sorensen v. Newman Grove State Bank, 128 Neb. 422, 259 N. W. 170.

Appellants contend that a general denial was included with the affirmative matters pleaded in their answer, and that the trial court was, because of this, in error in sustaining the motion for judgment on the pleadings. The effect of the answer was to plead an avoidance of the interests in the land alleged in the petition to be owned by appellees as tenants in common with appellants. The matters asserted to avoid the claims of appellees had been, as stated above, determined by a final decision of this court adversely to appellants. The allegations of the petition sought to be avoided by the claims of ownership of the land by purchase thereof by Elmer S. Anderson and title in him by adverse possession must be treated as admitted notwithstanding the

answer also contained a general denial. This has long been the doctrine of this court frequently announced and last applied in Hueftle v. The Farmers Elevator, 145 Neb. 424, 16 N. W. 2d 855: " 'Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or a matter to avoid, will be treated as admitted, though the answer also contains a general denial.' Nason v. Nason, 79 Neb. 582, 113 N. W. 139; Fielding v. Publix Cars, Inc., 133 Neb. 818, 277 N. W. 331."

The final decision of this court in the suit to quiet title estopped appellants from claiming any different or greater interest in the land than the shares stated and awarded to them by the decree of partition in this case.

The judgment of the district court should be, and it is, affirmed.

AFFIRMED.

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CORA POPE, APPELLANT, V. RICHARD H. TAPELT, APPELLEE.
50 N. W. 2d 352

Filed December 7, 1951. No. 33053.

1. **Trial: Evidence.** A litigant may withdraw his motion for a mistrial because of the admission of prejudicial evidence at any time prior to the court's ruling thereon.
2. **Evidence.** A litigant who adduces evidence allegedly prejudicial from a witness on cross-examination, and makes no timely objection thereto, thereby waives any claim of error in its admission.
3. **Negligence.** A litigant injured in an accident who has placed himself in a position of peril is not entitled to an instruction under the last clear chance doctrine where it appears that he had the means at hand up to the time of the accident to have avoided injury. Such a situation involves questions of negligence and contributory negligence and not the last clear chance doctrine.
4. **New Trial: Appeal and Error.** The ruling on a motion for a new trial for misconduct of the jury will not be disturbed on appeal where there is evidence to support it and the finding thereon is not clearly wrong.

5. **Juries: New Trial.** Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial.
6. **Trial: Juries.** Matters of supposition or opinion on the part of jurors while deliberating inhere in the jury's verdict and are not competent to be shown in an attempted impeachment of a verdict.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed.*

*Pilcher & Haney,* for appellant.

*Gross, Welch, Vinardi & Kauffman,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action for damages brought by the plaintiff, a pedestrian, who was struck by defendant's automobile while she was crossing a street in the city of Omaha. The jury returned a verdict for the defendant and the plaintiff appeals.

The plaintiff, Cora Pope, was a housewife, age 74 years at the times herein mentioned. On August 4, 1948, she started by streetcar to do some shopping. She alighted from the streetcar about 3:30 p. m., on Farnam Street just west of Turner Boulevard and proceeded on foot from that point. The day was bright and the streets dry. She testified that she walked east until she arrived at a point on the south side of Farnam Street opposite a traffic light on the north side of Farnam Street. She testified that as she started across Farnam Street the traffic light was green and that she started across after looking to the east and west for oncoming traffic. When she got about half way across she saw defendant's car going west on the north side of Farnam Street. After looking to the east a second time she saw defendant's car was about a car length from her. When she was

about half way between the north streetcar track and the north curb of Farnam Street she was struck and injured. She said she moved faster after seeing defendant's car and that she thought she had time to cross ahead of it. She testified that she remembered nothing thereafter until she regained consciousness in the hospital the next evening.

Plaintiff called one Dennis Radford as a witness. He testified that he was driving west immediately behind the defendant's car immediately before and at the time of the accident. He testified that he was driving about two or three car lengths back and to the left of defendant's car, that both cars were traveling about 20 miles an hour, and that he saw plaintiff crossing the street until she was struck by defendant's car. He said defendant's car did not swerve, but that it did stop almost immediately after the accident. He heard no horn sound and observed no application of brakes by the defendant before plaintiff was struck. He said he was moving west on a green light and, consequently, he assumed plaintiff was walking against a red light.

Defendant called as witnesses Mrs. Allen A. Blanchard and her daughter, Mrs. Philip J. Pospisal, who testified that they were standing on the southeast corner of the intersection of Farnam Street and Turner Boulevard waiting for a green light when the accident happened. They say that plaintiff crossed Turner Boulevard from west to east on a green light and turned northeast across Farnam Street on a red light. They testified that she waited for a streetcar going east to pass in front of her and then proceeded until she was struck by defendant's car. They stated that they saw defendant's car and the one following it driven by Radford, both of which were traveling slowly.

Defendant testified that he was proceeding west on Farnam Street prior to the accident. He says he stopped for a traffic light approximately 100 feet east of the point where the accident occurred. He then moved west-

ward on the north side of Farnam Street at 10 or 12 miles an hour. He met a streetcar coming from the west at a point east of the crosswalk near where plaintiff was injured. He testified that when he saw the plaintiff he applied his brakes and swerved his car approximately a foot and a half to the right. He testified that plaintiff was hurrying across the street and was struck by his left front fender and was thrown to the pavement immediately to the left of his left front wheel. He testified also that he had new tires on his car, that the brakes were in good working order, and that he was able to stop in a distance of two and one-half feet.

This evidence clearly raises issues which are for the jury to determine. The jury returned a verdict for the defendant. The evidence is ample to sustain the verdict. Plaintiff's assignment of error that the verdict is contrary to the weight of the evidence and is manifestly wrong is without merit.

Plaintiff urges that the trial court erred in failing to instruct the jury on the last clear chance doctrine. It is plain that the elements required to be present to warrant the giving of an instruction on last clear chance are not shown in the record before us. Whitehouse v. Thompson, 150 Neb. 370, 34 N. W. 2d 385. This issue is controlled by Carter v. Zdan, 151 Neb. 185, 36 N. W. 2d 781, wherein the court, in denying the applicability of the last clear chance doctrine, said: "Thus on appellant's theory it must be said that decedent negligently placed himself in a position of peril immediately before this accident. Could he have escaped by the exercise of ordinary care? Clearly he could have stopped or, if need appeared, stepped back out of the path of the oncoming automobile which he could have seen if he had exercised an appropriate degree of care for his own safety." The foregoing has equal application to the plaintiff in the case before us. There was no error in refusing an instruction on last clear chance.

Plaintiff asserts that the trial court erred in not grant-

ing a mistrial after both parties moved therefor. The record shows that plaintiff in cross-examining one of defendant's witnesses brought out the fact that she had been interviewed previous to the trial by defendant's insurance agent. Defendant moved for a mistrial, which the court took under advisement. Plaintiff made no objection to the statement at the time, but at a later time in the trial sought to join in the motion. Defendant thereupon withdrew his motion and in open court expressly waived any error in the reception of the evidence constituting the basis for the motion for a mistrial. Prejudice, if any, in the admission of the evidence was to the disadvantage of the defendant. Defendant's withdrawal of his motion for a mistrial, and his waiver of any error in the admission of the evidence affording the basis for the motion, has the effect of eliminating a claim of error emanating therefrom. The trial could properly continue as if no objection had been made to the evidence, or a motion for a mistrial had not been made. Plaintiff's motion for a mistrial came too late, assuming that the evidence upon which it was based was prejudicial to her.

The plaintiff assigns as error the failure of the trial court to grant a new trial for misconduct of the jury. The record shows the following situation: (1) During a recess of the trial a juror testified that another juror visited with the witness Mrs. Pospisal and advised her that if she became nervous and confused on the witness stand she should answer "I don't know" to each question asked; (2) one or more jurors stated, during the deliberations of the jury, that to give a verdict for plaintiff would result in defendant's losing his driver's license and the ability to procure insurance in the future; and (3) during a recess of the court a juror testified that another member of the jury stated to several jurors that she had asked the defendant the amount he was being sued for and that defendant had replied he was being sued for $25,000, that he had $10,000 insurance and that

he would be stuck for the $15,000, that his insurance company had offered plaintiff $10,000, that plaintiff had refused the offer, and that during the deliberations of the jury one or more jurors remarked that they had no sympathy for plaintiff because she had refused the $10,000 settlement.

The law applicable to a situation such as is here presented has been clearly stated by this court. It is its application to a given situation that ofttimes becomes difficult. It is a general rule that the affidavits or testimony of jurors are not admissible to impeach or avoid their verdict in respect to matters which inhere in the verdict itself. Scherz v. Platte Valley Public Power & Irrigation Dist., 151 Neb. 415, 37 N. W. 2d 721. A verdict must be based upon the evidence introduced in the case. The trial court passes upon the competency, materiality, and relevancy of the evidence offered to sustain or defeat the issues raised by the pleadings. The evidence must be given under oath with the right of the opposing party to test it by cross-examination, or to meet it by other evidence. If improper and prejudicial evidence is otherwise placed before and considered by the jury, the injured party is denied his right to a fair and impartial trial. Under such circumstances it is reversible error. The misconduct of the jury must relate to a material point in dispute. It must be of such a nature that it tended to prejudice the complaining party. It is also the rule that when a motion for a new trial on the ground of misconduct of the jury requires a consideration of conflicting evidence, the findings of the trial court thereon will not ordinarily be disturbed on appeal unless clearly wrong. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

As to the first point (1), the evidence is in conflict. The juror involved denies that she ever made such a statement to the witness, although she states she told other jurors that if she were a witness and became nervous and confused, she would answer "I don't know" to

questions put to her. The record discloses no prejudice arose from this source. The finding of the trial court thereon is sustained by evidence and will not be disturbed.

As to point (2), we think the mention of the possibility that defendant might be deprived of his driver's license, if found by the jury that he was negligent, is a matter that inheres in the verdict. This is described in Scherz v. Platte Valley Public Power & Irrigation Dist., *supra*, as a matter of opinion, supposition, or argument, and then held to be a matter which inhered in the verdict. The statements made as to the probability that defendant would be unable to obtain insurance in the future falls within the same rule. We find no error in the court's ruling denying a new trial on this ground.

As to the alleged misconduct which we have designated as point (3), it is clear from the evidence that information got to the jury from some source that defendant was sued for $25,000, that he had $10,000 insurance and that he would have to pay any judgment above that amount, that the insurance company offered to pay the plaintiff $10,000, and that she refused to accept it. Clearly, the foregoing could not have been properly admitted in evidence at the trial over objection. Consequently it was improperly placed before the jury by one of its members, whatever the source of the information may have been. We fail, however, to see where the plaintiff was prejudiced. That insurance was involved had already crept into the case on the cross-examination of a witness for the defendant. It would seem that a more specific statement of the insurance alleged to have been involved, with the further statement that plaintiff had been offered and had refused a $10,000 settlement, was evidence favorable to the plaintiff. It has always been considered by the courts, and we think correctly so, that it was prejudicial to the defendant and his insurance carrier for the jury to be apprized of the fact that defendant carried insurance. The alleged offer to settle

for $10,000 likewise militates to the advantage of the plaintiff. It affords no basis for a claim of prejudice.

The plaintiff contends that the reported offer to pay $10,000 and its refusal by the plaintiff was prejudicial to the plaintiff in that it made her appear to be greedy and grasping in her efforts to collect for her injuries. The evidence offered to sustain this contention is that of one juror who stated "a number of the jurors remarked that they had no sympathy for Mrs. Pope as she was offered the $10,000 insurance money and had refused it." Eight other jurors were called and they either were silent on the subject or testified that they had no such feeling, that they had made no such statements, and that they had heard no such statement made by any juror. It will be noted that the first juror did not testify that she herself had no sympathy for the plaintiff because of plaintiff's alleged refusal of the $10,000 settlement. This raised a question of fact for the trial court to decide. We cannot say from the record before us that the trial court's finding was not supported by evidence or that it was clearly wrong. The findings of the trial court on this point will not therefore be disturbed.

The errors assigned are without merit and the judgment of the district court is affirmed.

AFFIRMED.

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VIRGIL W. DRABBELS, ADMINISTRATOR OF THE ESTATE OF COLEEN ANN DRABBELS, DECEASED, APPELLANT, V. SKELLY OIL COMPANY ET AL., APPELLEES.

50 N. W. 2d 229

Filed December 7, 1951. No. 33054.

1. **Death: Actions.** A child born dead cannot maintain an action at common law for injuries received by it before its birth.
2. ———: ———. Since no cause of action accrues to a child

born dead for prenatal injuries, none survives to the personal representative under the wrongful death statute.

APPEAL from the district court for Sheridan County: EARL L. MEYER, JUDGE. *Affirmed.*

*Charles A. Fisher,* for appellant.

*Leo M. Bayer,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action by the administrator of the estate of Coleen Ann Drabbels, deceased, for her wrongful death. The defendants filed identical demurrers to the petition which were sustained. Plaintiff elected to stand on his petition and the trial court thereupon entered judgment dismissing the action. Plaintiff appeals.

The petition alleges that the defendant Skelly Oil Company is engaged in the selling of bottled gas under the trade name of Skelgas and that the defendant Frey is the agent of the Skelly Oil Company at Gordon, Nebraska, for the handling, sale, and delivery of Skelgas to the public. It is further alleged that Virgil W. Drabbels purchased a container of Skelgas from the defendant Frey which, because of the defective condition of the container, exploded and caused the death of the decedent. The explosion occurred on July 2, 1948. The decedent, the unborn child of Audrey Drabbels, wife of Virgil W. Drabbels, was born dead on July 5, 1948. The petition alleges that at the time of the explosion the pregnancy of Audrey Drabbels had advanced to a period of approximately eight months and that the unborn child was viable and capable of separate and independent existence.

The demurrer is directed to the following: That decedent was dead when born, that the child was never an existing person, that there was never a person or estate for which the plaintiff could be appointed the

administrator, and that plaintiff has no legal capacity to sue.

The action was commenced under the wrongful death statute of this state which provides: "Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." § 30-809, R. R. S. 1943.

The question raised by the demurrer is here for determination for the first time. Briefly stated, the question is whether the administrator of the estate of an unborn child, which dies prior to birth as the result of another's negligence, has a cause of action on behalf of the next of kin of the unborn infant under the wrongful death statute.

The wrongful death statute is plain in stating that the right of action created by it exists only in cases wherein the injured person could himself have maintained an action for damages had he lived. It is clear, therefore, that plaintiff can maintain no action for damages on account of the death of the child unless the child, had it lived, could have maintained an action against the defendants for the injury inflicted upon it before its birth. The cases hold, from a numerical standpoint at least, that damages for prenatal injury may not be recovered either by the injured child if it be born and lives or by its personal representative in the event of its death before birth from such injury. The early common law appears to be to this effect.

In Dietrich v. Northampton, 138 Mass. 14, 52 Am. R.

242, it was said: "Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning; * * *."

In Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 75 Am. S. R. 176, 48 L. R. A. 225, a leading case on the subject, the court said: "Appellant's counsel substantially admits that there is no precedent for the action. While it is true that this is not conclusive that the action may not be maintained, yet in view of the fact that, as said by Mr. Associate Justice O'Brien, similar circumstances must have before occurred, it is entitled to great weight, especially when the right to maintain the action is, to say the least, doubtful. Mr. Associate Justice O'Brien, in Walker v. Great Northern Railway Co. (28 L. R. Ir. 69) says: 'The law is, in some respects, a stream, that gathers accretions, with time, from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and if these are to be altered,—if new rights and engagements are to be created,—that is the province of legislation and not decision.' In this we fully concur. That a child before birth is, in fact, a part of the mother and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant

with it. We are of the opinion that the action will not lie."

In Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. 2d 944, 97 A. L. R. 1513, the court said: "Good reason is found for denial of the right of recovery in the fact that in many cases it would be impossible to establish except by speculation or conjecture that the death or condition of the child was proximately caused by the injury. But, far worse than the indulgence of such speculation and conjecture and the insurmountable difficulty of satisfactorily proving viability, there would follow in the wake of this character of litigation many fictitious claims, with false testimony in their support, which the defendants would always find difficult and often impossible to refute. These considerations, we think, outweigh the denial of justice in the abstract to the meritorius case."

The following cases sustain the view that under the common law no action would lie for the recovery of damages for prenatal injuries: Ryan v. Public Service Co-ordinated Transport, 18 N. J. Misc. 429, 14 A. 2d 52; Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503; Gorman v. Budlong, 23 R. I. 169, 49 A. 704, 55 L. R. A. 118; Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E. 2d 446; Newman v. City of Detroit, 281 Mich. 60, 274 N. W. 710; Buel v. United Railways Co., 248 Mo. 126, 154 S. W. 71, 45 L. R. A. N. S. 625, Ann. Cas. 1914C 613; Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489. See, also, Restatement, Torts, § 869, p. 404.

In our opinion a child born dead cannot maintain an action at common law for injuries received by it while in its mother's womb, and consequently the personal representative cannot maintain it under a wrongful death statute limiting such actions to those which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.

The contrary view regarding the rights of unborn

children is stated in the dissent of Justice Boggs in Allaire v. St. Luke's Hospital, *supra,* wherein it is said: "The law should, it seems to me, be, that whenever a child in utero is so far advanced in pre-natal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother and grow into the ordinary activities of life, and is afterwards born and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother. That proposition having been established, that an adjustment of damages with the mother could not preclude the child would naturally and necessarily follow." The principal and only case holding that a child born dead has a cause of action for prenatal injuries is Verkennes v. Corniea, 229 Minn. 365, 38 N. W. 2d 838, 10 A. L. R. 2d 634. Other cases and texts indicating similar views are collected in the Verkennes case and will not be cited here.

We adhere to the rule that an unborn child is a part of the mother until birth and, as such, has no juridical existence. There are cases holding that a child born alive may maintain an action for prenatal injuries. Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334, 10 A. L. R. 2d 1051; Jasinsky v. Potts, 153 Ohio St. 529, 92 N. E. 2d 809; Bonbrest v. Kotz, 65 F. Supp. 138. This question, however, is not before us and we leave it for determination if and when it arises. But the only case cited to us or that we have been able to find which holds that the personal representative of a child born dead could maintain an action for prenatal injuries is the Verkennes case. It makes no distinctions between cases where the child was born dead or alive after suffering prenatal injury. The Verkennes case is contrary to the great weight of authority in holding that the personal representative of a child born dead, which had suffered prenatal injuries, could main-

tain an action therefor. If the child had been born alive there would have been authority to sustain a recovery, although it appears at present to be a minority view. The viability theory appears to be vulnerable. It is true, of course, that medical science has found the means to sever a viable unborn child from the mother ordinarily without serious injury to the child; but even so, such medical development could not operate to change the common law rule that a child en ventre sa mere is considered a part of the mother insofar as a recovery for prenatal injuries are concerned. Medical science might accelerate the birth, but it cannot ipso facto change the rule. Consequently, medical science may accelerate the birth of a viable child and thereby accelerate the time it came into juridical existence as a person independent of the mother. But we can find no convincing authority that a child born dead ever became a person insofar as the law of torts is concerned.

In Lipps v. Milwaukee E. R. & L. Co., 164 Wis. 272, 159 N. W. 916, L. R. A. 1917B 334, the court aptly said: "The fact that the criminal law protects non-viable infants does not affect the question of their civil rights. The criminal law rests upon grounds of public policy and affects the public; the law of torts relates solely to the rights of private parties. So, too, the fact that for purposes of inheritance, taking under a will, etc., the existence of unborn children is recognized in law has no particular bearing upon the question of their right to recover for injuries sustained before birth. Neither does the medical or scientific recognition of the separate entity of an unborn child aid in determining its legal rights. The law cannot always be scientific or technically correct. It must often content itself with being merely practical."

Since no cause of action accrued to the child born dead, for injuries received before birth, none survived to the personal representative under the wrongful death statute. It would appear, therefore, that an action of this

character may not be maintained unless and until the right to bring it is afforded by legislative enactment. The trial court, therefore, properly sustained the demurrer to plaintiff's petition.

AFFIRMED.

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IN RE ESTATE OF ALVIN A. BINGAMAN, DECEASED. JULIAN L. PETERSON, APPELLEE, V. ESTATE OF ALVIN A. BINGAMAN, DECEASED, APPELLANT, IMPLEADED WITH JOHN P. MAINELLI, DOING BUSINESS AS JOHN P. MAINELLI CONSTRUCTION COMPANY, APPELLEE.

50 N. W. 2d 523

Filed December 21, 1951. No. 32995.

1. **Executors and Administrators: Negligence.** An action for personal injuries may be prosecuted against the estate of a decedent whose negligence is alleged to have been the proximate cause of the injury.
2. **Abatement and Revival: Negligence.** The right to an action for personal injury does not abate by reason of the death of the wrongdoer before the action was brought.
3. **Contracts: Master and Servant.** The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties.
4. **Master and Servant: Negligence.** A person in the relationship of a fellow employee to another is not liable for negligent acts committed under the direction and control of the employer except for misfeasance or positive wrong.
5. **Evidence: Trial.** Circumstantial evidence is insufficient to sustain a verdict or to require submission of a case to a jury unless the circumstances proved by the evidence are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom.
6. **Trial.** A motion made for a judgment notwithstanding the verdict pursuant to the terms of section 25-1315.02, R. R. S. 1943, requires the trial court to re-examine the legal sufficiency of the entire evidence to sustain the verdict and judgment and if it is found insufficient, to render a proper judgment notwithstanding the verdict and judgment previously rendered.
7. **Appeal and Error.** On appeal from the ruling on such motion

this court is required to examine the evidence in the same way and for the same purpose.

8. Negligence. In an action in tort for damages for personal injuries negligence is never presumed and cannot be inferred from the mere fact that an accident happened.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded with directions.*

*Cranny & Moore,* for appellant.

*G. H. Seig* and *David D. Weinberg,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an appeal from the verdict of a jury and a judgment of the district court in favor of Julian L. Peterson, plaintiff and appellee, for $13,875 against the Estate of Alvin A. Bingaman, deceased, defendant and appellant. The cause originated as a claim filed by this appellee against the appellant. The estate was probated in the county court of Douglas County, Nebraska. The claim was denied by the county court and this appellee took an appeal to the district court for Douglas County, Nebraska. It is from the verdict and judgment rendered on the appellate trial in the district court that the appeal herein has been taken.

John P. Mainelli, doing business as Mainelli Construction Company, was a named party to the action in both the county and district courts and is also named herein. He however has been named for the purpose of protecting his right of subrogation, if any he has, against the recovery, if there be any, in favor of Peterson and against the appellant. He is designated as an appellee but will be referred to hereinafter as Mainelli. Peterson will be referred to as plaintiff, the Estate of Bingaman will be referred to as defendant, and the deceased Alvin A. Bingaman as Bingaman.

The action as tried in the district court was for negligence on the part of Bingaman causing personal injury and damage to the plaintiff.

To the extent necessary to an understanding of the questions involved herein the petition charges in substance that on November 6, 1946, Mainelli orally contracted with Alvin A. Bingaman, who owned a certain truck on which was mounted a boom equipped with cables, to unload a carload of steel consisting of various parts of a mash tub and to convey these parts with the boom truck from a railroad siding into the Falstaff Brewery; that on November 7, 1946, Bingaman came to the premises involved and proceeded with the performance of the service contemplated; that the lid to the mash tub was hoisted by cables attached to the boom from the railroad car and the truck with Bingaman controlling and operating it moved to a point in front of the brewery; that after reaching this point Bingaman manipulated the controls in such manner as to cause the boom to come in contact with overhead high voltage electric wires which were suspended and carried on poles in front of the brewery and as a result thereof a great charge of electricity passed through the boom, the cables, and the vat lid into the person of plaintiff, severely and permanently injuring him; that plaintiff was in the employ of Mainelli and at the time was in due course of his employment aiding in the transfer of the lid from the railroad car to the brewery; that operation of the boom and cables by Bingaman was negligent; and that his negligence was the cause of plaintiff's injuries and damage. The specifications of negligence are the following:

"a. In placing and operating the said boom truck in such a position as to cause a high voltage electric current to strike the said boom and cables.

"b. In operating and manipulating the levers and controls on the said boom truck in such a manner as to cause the said boom and cables thereon to come into

contact with an overhead high voltage electric power wire.

"c. In failing to take adequate precaution to avoid coming in contact with said overhead high voltage electric wires."

The defendant denied that Bingaman was in anywise negligent. Other defenses were set forth in the answer but they do not require mention at this point.

There is no denial that the boom either came into contact with the wire or came so close to it that the current therefrom passed down the boom or cable and into the vat lid thus causing serious injury to plaintiff. Plaintiff was injured as were three other employees of Mainelli; also Bingaman was killed. On account of the death of Bingaman the action here is against his estate rather than against him personally.

One of the defenses to this action is that, assuming that Bingaman was guilty of negligence, action therefor being in tort, it did not survive and this action is not maintainable against his estate.

Under the holdings of this court the contention is without merit. The latest pronouncement on this subject is found in Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856. In that case by quotation from In re Estate of Grainger, 121 Neb. 338, 237 N. W. 153, 78 A. L. R. 597, it was said:

"An action for personal injuries may be prosecuted against the estate of a decedent whose negligence is alleged to have been the proximate cause of the injury.

"The right to an action for personal injury does not abate by reason of the death of the wrongdoer before the action was brought." See, also, Wilfong v. Omaha & C. B. St. Ry. Co., 129 Neb. 600, 262 N. W. 537.

At the close of plaintiff's evidence and again at the close of all of the evidence the defendant moved in the alternative for a directed verdict in its favor or for dismissal on the ground, among others, that the evidence

did not sustain the cause of action. The motions were overruled.

After verdict and judgment the defendant filed motions for judgment notwithstanding the verdict and for new trial. These motions were overruled.

Among numerous other assignments, the orders overruling these motions were assigned by defendant as errors entitling it to a reversal of the judgment.

In this situation it becomes necessary to examine the record in order to ascertain whether or not the cause of action finds support in the evidence.

The record discloses that on November 6, 1946, Lawrence V. Glynn, foreman of ironworkers for Mainelli, went to the place of business of Bingaman and there engaged Bingaman to come to the Falstaff Brewery on November 7, 1946, and bring with him a flat truck and a boom truck. The purpose of the engagement was to unload from a railroad car and deliver to the north side of the brewery the parts of a beer vat.

Pursuant to the arrangement Bingaman appeared with the two trucks at the appointed time. There were lines of electric wire running along the north side of the brewery. One line which was about 29 feet high carried a current of 2,300 volts and another about four feet higher carried 13,200 volts. This fact was discussed as was the further fact that it was not possible to get the current cut off during the period of this operation. This discussion was among four employees of Mainelli, including Glynn, and Bingaman. Everyone participating in the movements involved was informed of the danger of contact with or of too close proximity to the electric line.

The first movement described was the getting of the trucks to the railroad car for the purpose of unloading. This involved lowering the boom on the truck so as to permit passage under the wires. This movement as well as all other movements was under the direction and supervision of Glynn. Signals for all movements were giv-

en by Glynn or other employees of Mainelli. The wall of the vat was circular. It was divided into halves. The next movement was the lifting of one of the halves out of the railroad car and placing it on the flat truck. This was done by using the boom truck. The flat truck with this half was then taken to the brewery doors where an effort was made to back in for unloading. This could not be done. Thereupon at the direction of Glynn, Bingaman brought the boom truck around and after placing it in position removed the half from the flat truck and the flat truck was driven away. It was so placed under the supervision of Glynn. As placed the boom was from 30 to 40 inches from the electric wire carrying 13,200 volts of electricity. This distance Glynn and the others involved including Bingaman regarded as a safe distance. The half was lowered and the boom truck returned to the railroad car where the load line of the boom truck was attached and the second half removed. This half was thus carried to the front of the brewery where it was lowered. The top of the boom was placed in about the same relative position with the electric line as it was when the first half was lowered.

The boom truck was then returned to the railroad car where the load line or cable was attached to the lid of the vat and the lid removed from the car. The line was attached to a cable which passed through two holes in the lid. The holes were off center so that in consequence the load did not hang evenly on the line. Some part of the heavy side of the lid was caused to rest on the rear end of the truck. This lid, according to plaintiff's estimates, weighed around 2,500 pounds. According to the estimates of defendant it weighed about 3,500 pounds. In this position with certain employees of Mainelli steadying it the lid was transported to the front of the brewery. The truck was placed in substantially the same position as on the two previous occasions with the boom of the truck substantially the same distance from the top electric wire.

After the truck was placed in position Bingaman left the cab of his truck and got down and there is evidence that he placed his hands on the instruments by which the boom and the load line are controlled. That he operated these controls there is no direct evidence. After the truck stopped the employees who had participated in the movement from the car sought to disengage the portion of the lid which rested on the truck so as to permit it to be lowered to the ground. The lid became disengaged and turned as suspended on the cable or load line 160 to 180 degrees. At some point in the operation obviously after or coincident with the disengagement of the lid from the truck, current came down through the boom or cable injuring plaintiff, one Eric H. Rehn, one Robert E. Speed, and the already mentioned Lawrence V. Glynn and killing Bingaman. The plaintiff, Rehn, Speed, and Glynn appear to have been touching the lid but all of them were not able to give evidence of that fact. The shock appears to have in a measure destroyed the ability to recall some immediately preceding incidents. The boom was in close proximity to or in contact with the top wire immediately after the accident.

The evidence of plaintiff indicates that the truck stood at about a 35 to 45 degree angle to the top electric wire; that the height of the boom above the point of attachment to the truck was about 36 feet; that the over-all height from the ground was about 40 feet; and that the boom by the use of the controls to lower it could have been brought into contact with or in close proximity to the top electric wire. The boom did not operate sidewise from its point of attachment but only up and down from the point of attachment on a plane parallel with the length of the truck.

The plaintiff has rested his case in chief insofar as negligence is concerned on proof of placement of the boom truck and an inference from the fact that having had his hands on the controls Bingaman operated the controls of the boom after the truck was placed.

The controls operate manually. The power for operation comes from the power unit of the truck. The plaintiff in his case in chief offered no evidence as to known operation or method of operation of controls beyond the fact that all operations were performed by Bingaman on signals from Glynn or other ironworkers, employees of Mainelli; except the inferred operation of lowering the boom into the electric wire or into such close proximity as to cause the claimed injuries to plaintiff and to the others and the death of Bingaman.

The first motion for directed verdict or for dismissal challenged the sufficiency of this evidence to sustain plaintiff's cause of action. That this motion should have been sustained there can be little doubt.

As pointed out there are three specifications of negligence. The first relates to the placing and operating of the truck. This was done by Bingaman in accord with and under the direction and control of Mainelli's foreman. No act of Bingaman in this connection was independent of the control and direction of the foreman. He was therefore an employee and not, as the plaintiff contends, an independent contractor. The right of control and the contract of hiring in this situation created the relationship of master and servant as between Mainelli and Bingaman.

In Mansfield v. Andrew Murphy & Son, 139 Neb. 793, 298 N. W. 749, a case involving the principle under consideration here, this court pointed out that the contract under which service was to be performed and performance thereunder were determinative of the true status of the parties. It was there pointed out also that where in the relationship there was no factual dispute the question of the legal relationship was one for the court and not the jury. There is no material factual dispute in the present instance.

In this relationship Bingaman, not being charged with the duty in the first instance with placing the truck, was not liable for injury to plaintiff, a fellow employee,

resulting from placing or parking the truck where he did under the direction of Mainelli's foreman. Pester v. Holmes, 109 Neb. 603, 191 N. W. 709; Showers v. Lund, 123 Neb. 56, 242 N. W. 258; Wilson v. Thayer County Agricultural Society, 115 Neb. 579, 213 N. W. 966, 52 A. L. R. 1393; Restatement, Agency, §§ 354, 355, pp. 776, 779.

Under these authorities it is pointed out that one in the situation of Bingaman could be held accountable for misfeasance or positive wrong. However there is nothing in the record to indicate that Bingaman was, in the placing of the truck, guilty of misfeasance or positive wrong or even of nonfeasance. There was no evidence upon which to justify a submission of this charge of negligence to a jury.

The third specification of negligence is that Bingaman failed to take adequate precaution to avoid coming in contact with the high voltage electric wire. If this specification was intended to embrace only the question of placement of the truck and boom independent of operation after placement, then it is not materially different from the specification already discussed and the disposition there is appropriate here.

If however it involves operation or claimed operation after placement, then it becomes a part of the second specification. It will be so regarded.

As already pointed out the charge in the second specification is that levers and controls were operated and manipulated in such manner as to cause the boom and cables thereon to come in contact with the electric wire.

Again as has already been pointed out there is no direct evidence of operation or manipulation of levers and controls. There is only evidence that Bingaman was in a position where he could operate and manipulate the controls. There is evidence that the edge of the lid was removed from the truck, but whether this was effected alone by the efforts of the men seeking to remove it or assisted by movement of the boom is a mat-

ter of conjecture and speculation. There is evidence that the boom was against or near the wire after plaintiff was injured but plaintiff in his case in chief offered no evidence of any kind to explain how it got there, that is whether it got there as a result of the operation or manipulation of controls or whether because of the position of the truck and boom the weight of the suspended lid pulled the boom over to the wire.

The theory arguendo of plaintiff at the close of the case in chief is that his evidence circumstantially shows that the contact was brought about by the operation of the controls by Bingaman. The theory of the defendant is that at that time by the evidence the cause of the injury to plaintiff was left in the realm of conjecture and speculation and in consequence there was no question for submission to a jury.

The rule which is applicable here is stated in Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624, as follows: "Circumstantial evidence cannot be said to be sufficient to sustain a verdict or to require submission of a case to a jury depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom." See, also, Anderson v. Interstate Transit Lines, 129 Neb. 612, 262 N. W. 445; Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533.

The circumstances of plaintiff's case in chief are not of such a nature and so related to each other that the only conclusion which could be fairly and reasonably drawn therefrom was that Bingaman manipulated and operated the controls so as to cause the boom to come into contact with the electric wire. At least one other fair and reasonable conclusion could be drawn therefrom and that is that the release of the lid from the end of the truck caused it to swing in the direction of the wire thus pulling the boom into it without any act upon the controls by Bingaman. The motion for directed verdict

made at the close of plaintiff's evidence should have been sustained. It was overruled.

The defendant adduced its evidence and plaintiff his rebuttal, whereupon motion was again made for directed verdict or for dismissal, which, as already indicated, was overruled. The case was submitted to the jury and the verdict hereinbefore referred to was returned.

Pursuant to and in conformity with the provisions of section 25-1315.02, R. R. S. 1943, the defendant filed a motion for judgment notwithstanding the verdict and a motion for new trial. The motion permitted and required the trial court to re-examine the legal sufficiency of the entire evidence to sustain the verdict and judgment and if it was found that it was insufficient, to render a proper judgment notwithstanding the verdict and judgment previously rendered. On appeal this court is required to examine the evidence in the same way and for the same purpose. It follows then that we are required to examine the entire record to ascertain whether or not there is evidence legally sufficient to sustain the verdict and judgment.

On behalf of defendant, Ruth Bingaman was called as a witness. She gave testimony regarding the arrangement under which Alvin A. Bingaman went to the brewery. This testimony indicates that he was engaged under a contract of hiring and not as an independent contractor. The only material departure from the plaintiff's evidence in this respect is in the rate of pay.

The next witness called was Howard F. Thomas. He is an engineer. His testimony contained a description of physical conditions surrounding the brewery and the scene of the accident.

The next witness was Lee Bingaman. He described the boom truck and its mode of operation and also the mode of operation of the boom and the load line. He testified that the boom operates manually; that it can be started only manually; that it does not stop automatically; that if the clutch is engaged either for upward or down-

ward movement it can be stopped only by pulling out the clutch; that if the clutch was engaged for downward movement the movement would continue until the boom rested flat on the truck unless the clutch was pulled out; that the control of an upward movement was the same as for a downward movement; and that a similar clutch controls the load line or cable running over the boom. Gears control the upward and downward movements. After the gear is set and the clutch engaged movement may be stopped by pulling out the clutch. To prevent movement while the gear is engaged the clutch must be held out. If the clutch is released it will re-engage and movement will resume.

The position of the defendant is that it is reasonably inferable that Bingaman did not before nor at the time of the accident operate these controls and thereby cause the boom to come into contact with or in close proximity to the electric wire since if he had, movement would not have stopped at the wire but would have continued beyond until someone had manually pulled and held out the clutch.

The next and last witness called by the defendant was Ralf Toensfeldt. He is a consulting engineer in mechanical and electrical work. He examined the truck, the premises at the brewery, the location of the wire, and a photograph of the truck, the wire, and the lid taken very shortly after the accident. According to his testimony the lid was 14 feet 8 inches in diameter and weighed about 3,500 pounds. The boom is secured directly to the bed of the truck about 8 feet from the back end. The boom is 36 feet 3½ inches in length. It moves in a plane at right angles to the truck body. The height of the truck bed is about 4 feet. The top electric wire was about 33 feet 6 inches above ground. The holes in the lid through which the cable to which the load line was attached were 8 feet from one side and 6 feet 6 inches from the other. Before removal about 1,200 pounds of the lid weight was on the truck. The

lid on removal rotated about 180 degrees. On removal and rotation it shifted south or toward the building about 3 feet. The electric wire ran parallel to the building and was between the building and the truck. On account of a depression in which the right rear wheel was standing at the time there was a swing of the boom in the direction of the wire of about 3 degrees. On the basis of this examination and taking into consideration the probable position of the truck and boom, the construction of the truck, the removal of the edge of the lid from the truck, and the probable effect of the removal and the position after removal, and through mathematical calculations, this witness came to the conclusion and gave it as his opinion that it was the removal of the lid and its rotation and swinging on the load line toward the building that caused the boom to come into contact with or in such close proximity to the wire as to cause the current to travel down and injure the plaintiff.

If this was the cause then the causal operation was one in which Bingaman had no part and over which he had no control.

In rebuttal William Freiden, an engineer, was called. This witness examined the truck and the photograph which was submitted to the witness Toensfeldt. He was informed of the weight of the lid and that four men, employees of Mainelli, were steadying and seeking to remove the edge of the lid from the truck.

He gave it as his opinion that the removal of the lid and its swinging and rotation would cause the top of the boom to be affected "maybe 1 or 2 inches"; that this movement would not cause the top of the boom to come into contact with the wire; that the boom was mechanically lowered if the truck was blocked or in a stationary position, or in his own words: "That's the only two reasons, sir, that make that boom touch that line as far as I could see, is by controlling the boom or by the truck moving."

This witness was allowed substantially to assume that

Bingaman had engaged the clutch for downward movement and that he caused downward movement until the boom made contact with the wire. Based on this assumption he said, to use one of his statements: "* * * he could have held onto it long enough to pull the gear lever out of position because they aren't difficult to push in and out; they work very easily."

This testimony was elicited for the purpose of creating an inference in rebuttal of the inference from the defendant's evidence that there could have been no manipulation of controls by Bingaman since if there had been the boom would not have stopped at the wire but that it would have descended until it was down flat on the bed of the truck.

This résumé, it is believed, fairly presents the evidentiary features upon which a determination of whether or not the defendant is entitled to a judgment notwithstanding the verdict must rest. Some points of consideration become clear in this connection beyond peradventure.

Bingaman was engaged to perform a service for Mainelli under a contract of hiring, and the service performed and to be performed, with one exception, if indeed there was an exception, was under the direction of the foreman and other employees of Mainelli. The exception will be noted later.

The evidence wholly fails to sustain any contention of negligent placement of the boom in the first instance with reference to the wire. The evidence of the plaintiff indicates that the truck was parked with the boom a safe distance from the wire.

The exception to performance of service by Bingaman under the direction of the employees of Mainelli is an inference that without direction he lowered the boom on his own initiative while the men were seeking to remove the edge of the lid from the truck.

The question of whether or not Bingaman did in fact lower the boom is dependent wholly and solely on cir-

cumstantial evidence. The evidence is sufficient to reasonably sustain an inference that if he in fact did lower the boom that he did so without direction and of his own volition.

Unless the circumstantial evidence adduced was sufficient to sustain the contention that Bingaman was guilty of a departure in this regard then there was no issue for submission to a jury.

In an approach to a consideration of this matter two rules of law are pertinent. One is the circumstantial evidence rule already set forth. The other is: "Negligence is never presumed, and cannot be inferred from the mere fact that an accident happened." Bixby v. Ayers, *supra.* See, also, Engel v. Chicago, B. & Q. R. R. Co., 111 Neb. 21, 195 N. W. 523; Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565; Anderson v. Interstate Transit Lines, *supra;* Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673; Meyers v. Neeld, 137 Neb. 428, 289 N. W. 797.

From an examination of the record in the light of these rules it is to be observed that the plaintiff rested the case in chief solely on proof that there was an accident which has been described, and that after the accident and after four men were injured and one killed the boom was shown to be either in contact or in close proximity to the electric wire. No witness, expert or nonexpert, was called to give testimony as to how the contact or proximity was accomplished.

As pointed out, the plaintiff called a witness in rebuttal. The purpose was to rebut testimony of a defense witness who gave it as his opinion that the contact or proximity to the wire was caused by the release, rotation, and swinging of the lid. In this rebuttal testimony, basing it on an examination of the truck, its construction, and various mechanisms, a photograph showing the truck and its location with reference to the wire after the accident, and being informed of the weight of the lid and its location before and after the accident,

the witness gave it as his opinion that the contact or proximity was caused by operation of the controls by Bingaman. This opinion was not unequivocal however. He qualified it by the statement that this could have happened in two ways, one by controlling the boom and the other by the truck moving.

May it be said that the circumstances outlined were of such a nature and so related that the only reasonable conclusion to be drawn from them is that Bingaman operated and manipulated the controls on this truck so as to cause the boom to come into contact or close proximity to the wire? We think it may not. We think that other reasonable conclusions are not excluded by the evidence.

The rebuttal witness admits of one other conclusion. He stated that movement of the truck could have caused it. There is no evidence that the truck did move, and on the other hand there is none which excludes the possibility that it did.

The weight of the conclusion of this witness that Bingaman operated the controls also must be considered in the light of his speculative ability to explain the stoppage of the boom on contact with the wire. As we interpret his testimony in this respect he concludes that there was either a voluntary withdrawal of the clutch and gear before contact or an involuntary reaction which withdrew them after contact. He does not disagree with the proposition that in the absence of withdrawal the boom would have continued on down to the bed of the truck.

As previously pointed out Ralf Toensfeldt was called by the defendant and gave his opinion as to what was the cause of the contact. Of course this may not be weighed against the evidence of plaintiff for the purpose of determining whether or not the evidence of plaintiff was sufficient as proof of a cause of action.

When however the reliance is wholly upon circumstantial evidence to sustain a cause of action it appears

proper to consider other hypotheses which it is contended test the sufficiency of evidence under the circumstantial evidence rule. The testimony of this witness presents such a hypothesis and test.

We are unable to say that the conclusions and opinions contained in the evidence of this witness are subject to rejection as unfair and unreasonable.

This being true it becomes necessary to say that under the circumstantial evidence rule the evidence of plaintiff is insufficient to sustain a cause of action.

The judgment is reversed and the cause remanded with directions to enter judgment notwithstanding the verdict in favor of defendant and against the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

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EDWARD KESSLER, APPELLANT, V. BATES & ROGERS CONSTRUCTION COMPANY ET AL., APPELLEES.
50 N. W. 2d 553

Filed December 21, 1951. No. 33025.

1. **Master and Servant.** The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts.
2. ———. The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there had been a change in relationship and he had become, for the time being, a special employee of another person.
3. **Trial.** It is the duty of the district court to direct a verdict and render a judgment thereon if but one conclusion can reasonably be deduced from all the evidence in the case.

APPEAL from the district court for Sarpy County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

*Gross, Welch, Vinardi & Kauffman,* for appellant.

*Brown, Crossman, West, Barton & Quinlan,* and *Donald T. Fox,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellant sued Bates & Rogers Construction Company, appellee, for damages on account of personal injuries claimed to have been sustained by him because of negligent acts of William J. Gallagher, an employee of appellee, while, as it is claimed, he was engaged in performing services for, at the direction of, and subject to the control of his employer.

The district court, when the evidence of the parties was concluded, granted the motion of appellee for a peremptory instruction to the jury to return a verdict for it, rendered a judgment on the verdict, and refused appellant a new trial. William A. Pope Company was the employer of appellant, but no negligence is charged or claim made against it. It is a party only because of any subrogation rights it may have because of the Nebraska Workmen's Compensation Act.

Appellant claimed he was injured because of the negligent operation of a crane by William J. Gallagher, an employee of appellee, while pipe, the property of William A. Pope Company, was being unloaded from a railroad car near the site where each of the contractors, Bates & Rogers Construction Company, appellee, and William A. Pope Company, was engaged in construction work; and that at the time of the accident the machine was owned and operated by appellee in its business and the operator thereof was directed and controlled by it. The contention of appellee in this regard was that the machine and the operator thereof were loaned or leased to the Pope Company for a consideration to assist it in unloading a car of large and heavy pipe owned by it; that at the time of the accident the machine was being operated by it in its business and the crane and Gallagher were under the exclusive control and direction of the Pope Company; that Gallagher was then a special em-

ployee of that company; that he and the appellant were at the time of the accident fellow employees of the Pope Company; and that appellee had no interest in, connection with, or control of the machine, the operator thereof, or the work being done at that time.

The Central Nebraska Public Power & Irrigation District desired to construct a large power plant for the generation of electric energy not far from the town of Bellevue, Nebraska, and near the Missouri River. It made a contract with appellee for the construction of the sub-structure and the super-structure of a multiple-story building as a part of the plant. It awarded a separate contract to William A. Pope Company to furnish and install all pipe desired and required in and incidental to the plant. The contractors and the contracts were wholly independent of each other, and neither contractor had any interest in nor responsibility for the performance of the contract of the other.

Appellee owned and had at the location of the construction heavy equipment including cranes, hoists, trucks, tractors, excavating and dirt moving machines, and like equipment necessary and usual to the work its contract required. The Pope Company had no such equipment there. It arranged to secure from appellee any machines or equipment of this character it required in the performance of the work under its contract, and appellee agreed to furnish an operator of any machine which was furnished by it to the Pope Company. Appellee was paid on an hourly basis by the Pope Company for any machine it secured and used, and in addition the wage of the operator.

The Pope Company on July 21, 1948, had a shipment of pipe on the railroad spur track near the place where the construction was being made. It was metal pipe in sections 40 feet long, 2 feet in diameter, and the weight of each was about 3,000 pounds. It was contained in a gondola car longer than the pipe. The pipe filled the car to capacity.

Jack Holt, the foreman of the Pope Company, on the morning of that day arranged with the foreman of appellee to furnish the Pope Company a crane to be used in the operation of unloading the pipe. Harry B. Stewart, superintendent of equipment for appellee, requested William J. Gallagher, a crane operator of 30 years' experience and then engaged as such by appellee, to leave the excavating job on which he was then working and to take the machine he was using to the spur track north of the plant then being constructed. He did as he was requested, and when he arrived with the machine Holt was near the car of pipe. Holt directed where and in what position in reference to the car the crane should be placed and where the pipe should be deposited as it was unloaded. His directions were followed by Gallagher; tests were made as Holt instructed to ascertain if the swing of the crane would cover the proper distance to execute the work as desired; and then, on signal from Holt, the bucket on the crane was set on the ground. Holt fastened a choker to the crane by placing it through the bucket in such manner that when strain on it was applied it would stay in the desired position and would lift and carry a section of pipe from the car to where it was desired to be placed on the ground. The choker was a steel cable of sufficient size to handle the desired load, and of sufficient length to reach from the place where it was fastened to the crane to the ends of a section of the pipe. It is also referred to in the record as a cable, a spreader, and a stringer. Each end of it was equipped with a large steel hook 12 inches long and of proper shape to be inserted in the ends of the pipe. Chokers were hard to get and each contractor had his own. They were identified by the color of paint applied to them.

The crane was rigged by Holt, and for this purpose he used a choker or spreader of his employer. The attention of Holt was directed to the bucket on the crane, and it was suggested that it be removed and the choker

fastened directly to the crane. Holt refused to do this because of the time required to detach it. When a crane is to be used to handle pipe it is rigged for the operation by the owner of the pipe.

The operation after the crane was rigged by Holt was that Gallagher raised the bucket sufficient to clear the top of the car, moved the boom over the car, and lowered the choker. The hooks attached thereto were placed in the ends of a section of the pipe, in the north end by Holt, and in the south end by appellant. The pipe was raised to clear the car, the boom moved to the south and west, and the pipe lowered and spotted in the pile on the ground. After the crane was placed in position by the car containing the pipe, Gallagher did not operate the crane in any way or for any purpose other than in compliance with the directions and signals of Holt, except in spotting the pipe on the pile on the ground, the signal was given by another employee of the Pope Company. About ten sections of the pipe were unloaded from the car in this manner without any unusual happening. Thereafter in the removal of another section of the pipe, the accident happened resulting in injuries to appellant.

Jack Holt, the foreman of the Pope Company, was the boss on the job and directed the activities of everyone who was there, made all of the decisions, and gave the directions and signals to Gallagher who remained in the cab of the crane where the controls were for the operation of it. There is no evidence that Gallagher or anyone connected with appellee had or exercised any authority there or that he supervised or in any manner directed the operation.

The application of the doctrine of respondeat superior in any case depends upon the power of control which the superior possesses and which for the protection of third persons he is required to exercise over the conduct and activities of his subordinates. It follows that the doctrine has application only in cases where the

power of control exists, and it does exist when the employer has the right and power of control of the acts and of the retention or discharge of the employee.

A servant may be loaned by his master to another so that the acts of the servant become the acts of the master to whom he has been loaned, and during the continuance of that status the first or general master is not responsible for the acts of the servant.

In this case it is true that appellee selected and constituted William J. Gallagher its employee and compensated him as such. These are circumstances, if nothing else intervened, that would be strong to show he continued and was the servant of appellee. It was reimbursed for his wages and was paid for the use of the machine while it was engaged in the work of the Pope Company. Gallagher was the servant of appellee in a great many things and generally, but as to the operation of the crane at the time of the accident, he was not its servant but was then bound to and worked under the orders of the Pope Company given by its foreman, and if it had seen Gallagher misconducting himself in working the crane or disobeying its orders, it could have discharged him from that employment.

In determining who is liable for the negligence of a servant in the general employ of one person but who at the time of the injury, because of which suit is prosecuted, was assisting another, the usual test is whose work was being performed and who had the power and right to control and direct the servant in the performance of that work. In Mansfield v. Andrew Murphy & Son, 139 Neb. 793, 298 N. W. 749, it is said: "The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts. * * * The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there had been a

change in relationship and he had become, for the time being, a special employee of another person." See, also, Westover v. Hoover, 88 Neb. 201, 129 N. W. 285, 19 A. L. R. 215; Forsha v. Nebraska Moline Plow Co., 89 Neb. 770, 132 N. W. 384.

Appellant relies much upon The Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. Ed. 480, 29 S. Ct. 252. That case is probably more frequently referred to than any other in the area of the law here under consideration. It is a very considerable landmark in a wilderness of judicial and text literature on the subject of whether an operator of a leased machine furnished by the lessor is, during the term thereof, in the employ of the lessor or of the lessee. If the evidence in this case had tended to support the allegation of appellant that the crane, at the time of the accident, was operated by appellee in the furtherance of its business and under and by its direction, this case would have had greater application. There is no evidence of the truth of those statements which were essential to the case of appellant. The work being done was that of the Pope Company and not an undertaking of appellee. It was being done under the control and exclusive direction of the Pope Company. In that case the court spells out the law on this subject as follows: "It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men became pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished

is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. * * * To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work." See, also, Western Marine & Salvage Co. v. Ball, 37 F. 2d 1004; Malisfski v. Indemnity Ins. Co. of North America, 135 F. 2d 910; Wylie-Stewart Machinery Co. v. Thomas, 192 Okl. 505, 137 P. 2d 556; McFarland v. Dixie Machinery & Equipment Co., 348 Mo. 341, 153 S. W. 2d 67, 136 A. L. R. 516; Annotation, 17 A. L. R. 2d 1442; Annotation, 55 A. L. R. 1263; Restatement, Agency, § 227, p. 500, and Comment d, p. 503.

There is no dispute as to the arrangement between appellee and the Pope Company for the use of the crane by it in unloading its car of pipe, and what the parties did in carrying out the agreement is likewise not controverted. There is no evidence that appellee reserved or had or exercised any control of the crane or the operator thereof after it arrived at the location of the car containing the pipe during the unloading of it. A verdict based on a conclusion that Gallagher at the time of the accident was an employee of and acting for appellee could not have been sustained. It was the duty of the court to instruct a verdict for appellee. Jensen v. Romigh, 134 Neb. 890, 280 N. W. 223, states the rule: "Where but one rational conclusion can be drawn from all the evidence, it is the duty of the trial court to direct a verdict or to render judgment accordingly." See, also, Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106. Mansfield v. Andrew Murphy & Son, *supra*, a case somewhat similar to this, says: "In such case, whether the right of control, or want of it, existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the

persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court."

The judgment of the district court should be, and it is affirmed.

AFFIRMED.

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JACK WEBBER ET AL., APPELLANTS, V. CITY OF SCOTTSBLUFF, NEBRASKA, APPELLEE.
50 N. W. 2d 533

Filed December 21, 1951. No. 33036.

1. **Eminent Domain: Statutes.** Since statutes prescribing proceedings for the condemnation of property and the assessment of compensation are in derogation of general right and of common-law modes of procedure, they must be strictly construed against the condemner and in favor of the landowner.
2. ———: ———. But they should not be so strictly construed as to defeat the purpose sought to be accomplished.
3. **Eminent Domain: Courts.** When it comes to the stage of compensating the owner of the property by ascertaining the value of the property taken, or damaged, this requires the exercise of judicial functions.
4. ———: ———. The owner of the property to be condemned is entitled to notice of the proceedings and an opportunity to protect his rights.
5. **Eminent Domain: Appeal and Error.** On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings.
6. **Courts: Appeal and Error.** Jurisdictional defects may be noticed at any stage of the proceedings, for the reason that if the court proceeds without jurisdiction, the whole proceedings are null and void.
7. **Courts: Estoppel.** A party invoking the court's jurisdiction in a case where the court has jurisdiction of the subject matter is estopped to object thereto afterward.
8. **Clerks of Courts.** Money paid to the clerk of the court pursuant to an order or judgment of the court is received by the clerk in his official capacity.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

*Mothersead, Wright & Simmons,* for appellants.

*Jack E. Lyman,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal by Jack Webber and Mamie Webber from an order of the district court for Scotts Bluff County overruling their motion. The purpose of the motion was to have the district court for Scotts Bluff County enter an order finding that the city of Scottsbluff had obtained no interest in their lands by reason of the proceedings taken under its ordinance No. 739.

This appeal arises out of the same condemnation proceedings as were involved in Webber v. City of Scottsbluff, 150 Neb. 446, 35 N. W. 2d 110, being case No. 32440. It will be herein referred to by that number. Therein we affirmed the judgment of the district court based on a jury's verdict assessing the amount of damages to be paid for the land taken from the appellants by reason of ordinance No. 739.

Chronologically the history relating to the city of Scottsbluff seeking to take appellants' land for a public use is as follows: On June 17, 1947, the city passed and approved ordinance No. 739 to appropriate certain property which it therein determined to be necessary for the use of the city for sewers, water mains, streets, and boulevards. This ordinance described by metes and bounds nine separate tracts that were needed for that purpose. Included therein was tract No. 6, being land owned by appellants, which is the property herein involved. The ordinance appointed three disinterested freeholders of the city of Scottsbluff to assess the damages for each tract of land appropriated and directed them to meet on July 24, 1947, at the hour of 10:00 a. m.

at the office of the city clerk of the city for that purpose. Ordinance No. 739 was published in the Scottsbluff Daily Star-Herald on June 20, 1947. The three assessors appointed by the city to assess damages for the property being taken filed their report with the city on July 24, 1947. Therein they set forth that on July 24, 1947, at 10:00 a. m., they met at the office of the city clerk and proceeded to assess the damages for the lands appropriated by the city, including tract No. 6 which belonged to appellants. The report shows they assessed the damages for tract No. 6 in the total sum of $2,854 and apportioned it as follows: $1,427 to Jack Webber and $1,427 to Mamie Webber. Upon the filing of the appraisers' report the mayor and council of the city, on August 5, 1947, passed and approved a resolution by which the city approved the amounts of damage allowed with respect to each of the nine tracts and directed the city treasurer to pay to the parties, as shown by the report, the amounts due them. It also provided, in the event any of the parties refused to accept such sum, that the amount so refused be deposited with the city treasurer subject to their order. Warrants were issued to each of the appellants for the amount of their damages. Appellants refused to accept payment and returned the warrants. The warrants were thereupon canceled and the amount thereof was deposited to the account of the condemnation.

On August 7, 1947, appellants filed in the office of the city clerk their notice of appeal to the district court for Scotts Bluff County. Therein they set forth they were appealing from the assessment of damages made by the assessors appointed for that purpose and whose report had been approved by the city on August 5, 1947. This appeal was lodged in the district court on August 14, 1947. On appeal to the district court the trial resulted in a verdict for appellants in the amount of $6,463.25. Motion for new trial was filed and overruled. On appeal therefrom to this court the judgment on the verdict was

affirmed and mandate to that effect, dated December 24, 1948, was filed in the office of the district clerk for Scotts Bluff County on December 27, 1948. On September 20, 1949, the city council directed payment to be made of this judgment to the clerk of the district court for Scotts Bluff County and, as a result thereof, there was paid to the clerk of the district court for Scotts Bluff County on September 21, 1949, the sum of $7,153.74, being the amount of the verdict with interest to that date and costs of the proceeding.

The city took possession of this land sometime in January 1950 and made some improvements thereon. This was prior to May 17, 1950, the date the motion, the overruling of which is herein appealed from, was filed.

The record shows there has been no abandonment of this proceeding by the city and that it has, within a reasonable time, taken possession of the property and is proceeding to improve it for the public use for which it was taken.

Before discussing the particular questions herein raised by appellants it would be well to state certain general principles which relate to the subject matter of this appeal.

"Since statutes prescribing proceedings for the condemnation of property and the assessment of compensation are in derogation of general right and of common-law modes of procedure, they must be strictly construed against the condemnor and in favor of the landowner, * * *." 29 C. J. S., Eminent Domain, § 214, p. 1135.

"Proceedings to subject the property of another for public use under the doctrine of eminent domain must be conducted in the manner prescribed by the statute delegating the power." Spencer v. Village of Wallace, 153 Neb. 536, 45 N. W. 2d 473. See, also, State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683.

"* * * but they should not be so strictly construed as to defeat the purpose sought to be accomplished." 29 C. J. S., Eminent Domain, § 214, p. 1136.

"When it comes to the stage of compensating the owner of the property by ascertaining the value of the property taken, or damaged, this requires the exercise of judicial functions." In re Appraisement of Omaha Gas Plant, 102 Neb. 782, 169 N. W. 725.

"The owner of the property to be condemned is entitled to notice of the proceedings and an opportunity to protect his rights." 29 C. J. S., Eminent Domain, § 242, p. 1212.

"* * * the proceeding is in its nature judicial, and therefore, in determining whether or not the notice provided is sufficient, the principle governing such proceeding should govern." Albin v. Consolidated School District, 106 Neb. 719, 184 N. W. 141.

" '* * * The due process clause does not guarantee to a citizen of a State any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.' (Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 46 S. Ct. 384.)" May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

Appellants call our attention to the fact that in No. 32440 we stated that a judgment had been rendered on the verdict and affirmed such judgment, whereas, the record in that case does not show such to be the fact. It is true the transcript in No. 32440 does not show a judgment was rendered thereon by the court but only that the verdict was filed by the clerk of the court. However, both appellants and appellees in No. 32440 considered such judgment had been rendered. This is shown by their respective briefs. Appellants in their notice of appeal therein stated: "The above named plaintiffs, Jack Webber and Mamie Webber, * * * hereby appeal to the Supreme Court of the State of Nebraska, from the judgment entered in favor of said plaintiffs on the 10th

day of December, 1947, and from the order entered on the 5th day of January, 1948, overruling their motion for a new trial." It was the duty of the clerk of the court to have rendered such judgment when the verdict was received and filed by him. See section 25-1313, R. R. S. 1943, and Crete Mills v. Stevens, 120 Neb. 794, 235 N. W. 453. Whether or not the clerk failed to do so the record does not affirmatively show.

Condemnation is a special statutory proceeding. 29 C. J. S., Eminent Domain, § 209, p. 1127; Pierce v. Platte Valley Public Power & Irrigation Dist., 143 Neb. 898, 11 N. W. 2d 813; Oklahoma City v. Wells, 185 Okl. 369, 91 P. 2d 1077, 123 A. L. R. 662; Todd v. Atchison, T. & S. F. Ry. Co., 134 Kan. 459, 7 P. 2d 79; State v. Williams, 12 Wash. 2d 1, 120 P. 2d 496; City of Lebanon v. Public Service Co., 214 Ind. 295, 14 N. E. 2d 719; Epperson v. Johnson, 190 Okl. 1, 119 P. 2d 818. Consequently, section 25-1902, R. R. S. 1943, is applicable thereto.

But assuming, as appellants state, that no judgment has been rendered on the verdict and that the appeal in No. 32440 involved only the correctness of the jury verdict determining the value of the land involved, we think it will not benefit him in this appeal. It should here be stated that no pleadings were filed by appellants on appeal to the district court and consequently the only question raised by the appeal was the amount of damages. Pierce v. Platte Valley Public Power & Irrigation Dist., *supra*. As held in Trester v. Missouri P. Ry. Co., 33 Neb. 171, 49 N. W. 1110: "On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings." See Clarke v. Nemaha Valley Drainage District, 98 Neb. 549, 153 N. W. 584.

As to all questions rising prior to the appeal and verdict, the following rule is applicable: "'* * * jurisdictional defects may be noticed at any stage of the proceedings, for the reason that if the court proceeds with-

out jurisdiction, the whole proceedings are null and void.' (Toledo, A. A. & N. M. R. Co. v. Munson, 57 Mich. 42, 23 N. W. 455.)" Platte Valley Public Power & Irrigation Dist. v. Feltz, 132 Neb. 227, 271 N. W. 787. See, also, County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569. As to those arising subsequent to our affirmance and mandate they could be raised directly in the proceeding.

Two questions are raised by the appellants with reference to the appraisal of their property: First, that the ordinance did not set forth the time and place where the assessors appointed were to meet and make their appraisal. Second, that insufficient notice was given to appellants. The second involves two questions: Namely, that the ordinance did not name the landowners whose lands were being taken and that service by publication was not sufficient.

It should be understood that this is not a case where the statutes granting the power of eminent domain have failed to provide adequate provisions in its condemnation procedure to secure to the citizen whose property is being taken a day in court to have its value determined within the due process clause of both the state and federal constitutions as the provisions of section 16-602 and 16-603, R. S. 1943, are adequate for that purpose. Nor is it an action brought to enjoin the proceedings. It presents a situation where the issues are: Has the city, in taking the appellants' property, sufficiently complied with the statutory provisions and, if not, have appellants waived such deficiency by appealing from the award of the assessors to the district court for Scotts Bluff County pursuant to section 16-645, R. S. 1943, and therein raised only the issue relating to the question of damages?

Appellants contend the ordinance does not provide a time and place for a meeting of the assessors to fix the value of the property taken. In this respect the ordinance provides as follows: "* * * said assessors

shall meet on the 24th day of July, 1947, at the hour of 10 o'clock A. M., at the office of the City Clerk of said city and after taking the oath required by law shall proceed from said point to view the property above appropriated and they shall on the same day, or as soon thereafter as practical, make, file and return to the City Clerk in writing a just and fair assessment of the damages for each piece and lot of property, the whole or part of which is so appropriated and where there is more than one party having interest in a piece of property or lot the damages shall be by them justly apportioned and stated to each." This language is almost the exact language of section 16-602, R. S. 1943, insofar as that statute is applicable thereto. No doubt the language setting forth the time and place for the assessors to meet and fix the amount of damages each of the landowners would have by the taking of a part of their lands could have been more clearly stated but certainly no one would be misled thereby. It was at the office of the city clerk at 10:00 a. m., on July 24, 1947. At most it could be nothing more than an irregularity that was waived by not raising it when appeal was taken to the district court.

Appellants owned and resided on lands just outside of the city but adjacent thereto. Tract No. 6 of the lands taken by the city is a part of these lands.

The ordinance provided for the publication thereof in one issue of the Scottsbluff Daily Star-Herald. Publication thereof was made in the issue of that paper published on June 20, 1947. The ordinance provides that such publication shall be sufficient notice to all owners whose lands are being taken who reside outside the city but that a copy of such paper shall be delivered to each of the owners residing in the city, but if not found, to some person at their residence. The provisions for service provided in the ordinance are in accordance with section 16-603, R. S. 1943.

"It is almost universally held, however, that notice

by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending." 11 McQuillin, Municipal Corporations (3d ed.), § 32.124, p. 549.

"Notice, however, must be given the property owner so that he may appear before the appraisers and protect his rights. Wilber v. Reed, 84 Neb. 767. The legislature may authorize a municipality to enact an ordinance defining a reasonable procedure for the exercise of its authority. State v. Cosgrave, 85 Neb. 187; Paulsen v. Portland, 149 U. S. 30, 38." Chicago, R. I. & P. Ry. Co. v. Nebraska State Railway Commission, 88 Neb. 239, 129 N. W. 439.

We find the procedure provided by the Legislature to be reasonable and sufficient. The city having complied therewith, we find the publication of the ordinance to be sufficient notice to the owners and parties interested who did not reside in the city.

The ordinance, as approved and passed by the city and as published in the Scottsbluff Daily Star-Herald, did not contain the names of the parties whose lands were being taken.

We have said: "A party invoking the court's jurisdiction in a case where the court has jurisdiction of the subject-matter is estopped to object thereto afterward." McCall v. Hamilton County Farmers Telephone Assn., 135 Neb. 70, 280 N. W. 254.

As stated in Trester v. Missouri P. Ry. Co., *supra*: "Again, the plaintiff in error by taking an appeal to the district court from the award of the commissioners, entered his appearance and waived all objection as to notice. (O'Dea v. State, 16 Neb., 241; R. Co. v. Patch, 28 Kan., 470; Aiken v. Commissioners, 36 Id., 170; R. Co. v. Benham, 28 Mich., 459; R. Co. v. Allen, 100 Ind., 409.)"

We find the appellants, by taking an appeal to the district court from the award of the assessors and raising only the question of damages, entered their appearance therein and waived all objections as to notice.

Appellants contend that the title of the ordinance did not meet the requirements of section 16-404, R. S. 1943, when it failed to include a statement that the lands were necessary for the proper construction of any of the works provided for in section 16-601, R. S. 1943, since the lands of appellants were outside of the city limits.

Section 16-404, R. S. 1943, insofar as here applicable, provides: "Ordinances shall contain no subject which shall not be clearly expressed in the title, * * *."

Section 16-601, R. S. 1943, insofar as here applicable, provides: "The mayor and city council shall have power to purchase or appropriate private property for the use of the city for streets, alleys, avenues, * * * sewers, * * *. When necessary for the proper construction of any of the works above provided, the right of appropriation shall extend for a distance of ten miles from the corporate limits of the city."

The title of the ordinance is as follows: "An Ordinance of the City of Scottsbluff, Nebraska appropriating certain property described in said ordinance and which is within the County of Scotts Bluff, Nebraska, and within ten (10) miles of the corporate limits of said city to the use of the City of Scottsbluff, Scotts Bluff County, Nebraska for sewers, water mains, streets, and boulevards, appointing assessors and fixing the time and place of the meeting of said assessors, and describing their duties and remuneration and providing for the service of notice upon the owners of said real estate."

The ordinance itself, insofar as material, states: "That it is necessary that the following described property within the County of Scotts Bluff, Nebraska, and which said property is within ten miles of the corporate limits of said city, * * * be appropriated and condemned for the use of the City of Scottsbluff, Scotts Bluff County, Nebraska, for sewers, water mains, streets and boulevards."

We think what was said in Gembler v. City of Seward,

136 Neb. 196, 285 N. W. 542, is here applicable: " 'It is intended to prevent the practice of joining in the same ordinance incongruous subjects, having no relation or connection with each other, and foreign to the subject embraced in the title. Matters germane to the general subject expressed in its title may be united. * * * The title need not be an index to the act; nor need it state a catalogue of all the powers intended to be bestowed. "An abstract of the law is not required in the title;" nor need the title state the mode in which the subject is treated, nor the means by which the end sought by the enactment is to be reached.' McQuillin, Municipal Ordinances, sec. 141. See, also, 43 C. J. 523."

We find no merit to this contention as the title fully expresses the subject of what is contained in the ordinance itself.

After the assessors filed their report dated July 24, 1947, with the city clerk the mayor and council of the city on August 5, 1947, passed and approved a resolution finding, with respect to each of the tracts taken, that the assessment of damage made therefor to be fair, just, and reasonable and approved all of them, including that for tract No. 6 owned by appellants. This resolution directed the city treasurer to pay all the parties the amounts due them. This he attempted to do but the appellants refused the tender of the amount found due each of them and returned the warrants of the city that had been made out and delivered to each of them. The resolution also provided that in the event any of the parties refused to accept the amount allocated to them that then the amount so refused should be deposited with the city treasurer subject to their order. This the city treasurer did, returning the amount refused to the account set up for this condemnation. This is in accordance with section 16-604, R. S. 1943.

It is appellants' thought that this statutory right to reject or approve is also applicable to the verdict of the jury as well as to the return of the assessors. Such is

not the language of the statute. The statute refers specifically to the assessments made by the board of assessors appointed by the city. If the Legislature had so intended it could very easily have so provided by proper language. The fact that it took up this subject and provided that a city could, in the first instance, either reject or approve the assessment made by the assessors at the next regular meeting of the council after such assessment was returned, clearly indicates that they did not intend to extend it further. In fact, we are of the opinion that the city, once having approved the fixing of damages, is thereafter obligated, if appeal is taken therefrom, to pay whatever may be finally determined to be the damages.

After our mandate affirming the amount of damages fixed by the jury was filed in the office of the clerk of the district court on December 27, 1948, the city, on September 20, 1949, directed the amount thereof to be paid to the clerk of the district court in satisfaction of the judgment of the appellants. This was done on September 21, 1949. On that date there was paid by the city to the clerk of the district court for Scotts Bluff County the sum of $7,153.74. This was the amount of the damages fixed by the jury together with interest to that date and costs of the proceedings. It is apparent from the record that it would have been a futile gesture to have tendered this payment to the appellants.

Section 16-645, R. S. 1943, provides in part as follows: "The final judgment of the court shall be certified back to the city clerk."

We have said: "That money paid to the clerk of the court pursuant to an order or judgment of the court is received by the clerk in his official capacity, is no longer a disputable proposition in this state. Wheeler v. Barker, 51 Nebr., 846; Dirks v. Juel, 59 Nebr., 353." Bantley v. Baker, 61 Neb. 92, 84 N. W. 603.

We are of the opinion that on appeal, after the amount of damages had been definitely and finally determined,

the city can pay to the clerk thereof the full amount owing. It can thereby stop the accruing of interest and complete the proceedings. There is nothing in the statutes relating thereto that provides otherwise. To hold otherwise would defeat the very purpose for which courts are created, that is, to fully and finally decide the rights of parties and provide a means for the final settlement thereof. Here there was a single issue, the damages caused appellants by the taking of their property. When that was finally fixed it was the right of the city to pay it. Appellants had indicated they would refuse any tender thereof and the only way the city could satisfy the obligation was to pay it to the clerk of the court. This it did. When so paid into court the funds are thereafter in the custody of the law awaiting the direction of the parties entitled thereto.

Having come to the conclusion that the trial court was correct in overruling appellants' motion, its action in doing so is affirmed.

AFFIRMED.

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JACK WEBBER ET AL., APPELLANTS, V. CITY OF SCOTTSBLUFF, NEBRASKA, APPELLEE.
50 N. W. 2d 541

Filed December 21, 1951. No. 33037.

**Judgments.** The rule is well settled that a judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

*Mothersead, Wright & Simmons,* for appellants.

*Jack E. Lyman,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Jack Webber and Mamie Webber commenced this action in the district court for Scotts Bluff County against the city of Scottsbluff. The purpose of the action is to quiet and confirm in them, as against the city, the title to certain land therein described. After trial the action was dismissed. Plaintiffs filed a motion for new trial and, from the overruling thereof, appealed.

This action involves the same land as was involved in the condemnation action brought by the city and considered by this court in the case of Webber v. City of Scottsbluff, 150 Neb. 446, 35 N. W. 2d 110. It is a companion case to No. 33036, the opinion in which is reported at *ante* page 48.

Appellee pleaded that it was the owner of the real estate by reason of and through the condemnation proceedings which it had initiated. In view of that fact, as to all questions that were or could have been raised in the condemnation proceeding, the following principle is here applicable: "The rule is well settled that a judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose." Lowe v. Prospect Hill Cemetery Assn., 75 Neb. 85, 106 N. W. 429.

All the contentions here made are the same as those presented in No. 33036. Therein we disposed of the questions raised contrary to appellants' contention and affirmed the district court's ruling. That opinion is here controlling. In view thereof we find the order of dismissal to be correct and it is affirmed.

AFFIRMED.

KENNETH E. SAUTTER, APPELLEE, V. WILLIAM F. POSS, APPELLANT.

50 N. W. 2d 547

Filed December 21, 1951. No. 33038.

1. **New Trial.** An order granting a new trial will be scrutinized here with the same care as one denying a new trial.
2. ———. There is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented.
3. **New Trial: Appeal and Error.** Under this rule if the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant to present those reasons and in appropriate manner support his contentions that those reasons are not sustainable from the record and applicable rules of law. The appellee has then the duty, if he desires, of meeting those contentions. The appellee has the right to point out and submit additional reasons to sustain the trial court's judgment.
4. **Negligence.** Gross negligence, within the meaning of section 39-740, R. S. 1943, means negligence in a very high degree, or the absence of even slight care in the performance of a duty.
5. **Automobiles: Negligence.** The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car.
6. ———: ———. When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable.
7. **Negligence.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
8. **Negligence: Trial.** If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove the defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to re-

ceive the benefit thereof and the court must instruct the jury to that effect.

APPEAL from the district court for Greeley County: ERNEST G. KROGER, JUDGE. *Affirmed.*

*Lanigan & Ondracek,* for appellant.

*William J. Gartland,* and *Davis & Vogeltanz,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Kenneth E. Sautter brought this action in the district court for Greeley County against William F. Poss. The purpose of the action is to recover damages resulting from injuries sustained while riding as a guest in the car of defendant. Verdict was returned for defendant and judgment entered thereon. Plaintiff filed a motion for new trial and, from the sustaining thereof, defendant has appealed.

The court, as a basis for granting the new trial, was of the opinion that by instruction No. 7, which it had given on its own motion, it had placed a greater burden of proof on the plaintiff than the law imposes upon him.

The principles applicable in considering this appeal are as follows:

"The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion.

"As used in this connection judicial discretion means the application of statutes and legal principles to all of the facts of a case. * * *

"The power of judicial discretion authorizes and requires the court to determine the question as to whether or not a legal reason exists for the granting of a new trial. If a legal reason exists and the complaining party makes his application in writing within the time fixed by statute, the court has no discretion in the matter and

the motion must be sustained. If a legal reason does not exist, the court has no discretion in the matter and the motion must be denied. * * *

"An order granting a new trial will be scrutinized here with the same care as one denying a new trial.

"There is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented.

"Under this rule if the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant to present those reasons and in appropriate manner support his contentions that those reasons are not sustainable from the record and applicable rules of law. The appellee has then the duty, if he desires, of meeting those contentions. The appellee has the right to point out and submit additional reasons to sustain the trial court's judgment." Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

The accident, which resulted in appellee being injured, happened about midnight on April 21, 1950, at the intersection of State Highways Nos. 92 and 11 in Howard County. At the time appellee and Kenneth Halm were riding as guests in the car of defendant, the car being a 1949 Ford businessman's coupé. They were intending to go to St. Paul, Nebraska. Appellant's car, which he was driving, approached the intersection, referred to as the Midway Corner, from the north on Highway No. 11. After he entered the intersection appellant was not able to complete the turn to the east onto Highway No. 92 toward St. Paul. As a result the car hit a bank at the southeast corner of the intersection, rolled over, and came to rest in an adjacent field.

Appellant questions the sufficiency of the evidence to present a question of fact for the jury. Since appellee was riding as a guest in appellant's car the evidence adduced must be sufficient to support a finding that appellant was guilty of gross negligence in connection

with his operation thereof. See section 39-740, R. S. 1943.

Gross negligence, within the meaning of section 39-740, R. S. 1943, means negligence in a very high degree, or the absence of even slight care in the performance of a duty. Morris v. Erskine, 124 Neb. 754, 248 N. W. 96; James v. Krebek, 142 Neb. 757, 7 N. W. 2d 637; Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041.

The following principle is applicable to our consideration of the evidence for the purpose of determining this question: "A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569.

As stated in Landrum v. Roddy, *supra:* "We have held in many cases that the question of the existence of gross negligence must be determined from the facts and circumstances in each case."

There is evidence in the record to the effect that on April 21, 1950, the traveled surface of that part of Highways Nos. 11 and 92 here involved was of oil-mat construction and in good condition; that the weather was clear, visibility good, and the highway dry; that Highway No. 11 ran slightly to the east but mostly south; that defendant drove onto Highway No. 11 at Elba; that about five or six miles south of Elba Highway No. 11 intersects with Highway No. 92; that Highway No. 92 runs east and west, St. Paul being on Highway No. 92 about five miles east of the intersection; that about one mile south of Elba appellant was driving his car south at a fast speed; that about three miles south of Elba he was

driving 85 miles an hour; that about half a mile north of the intersection the car was traveling 95 miles an hour; that as the car approached the intersection it did not slow down; that there was a little gravel on the oil-mat surface in the intersection; that there was a sign on Highway No. 11 indicating they were approaching a junction; that appellant was familiar with the intersection as he had been on it before; that when he got to the intersection he slammed on his brakes; that the tires skidded on the oil-mat; that he was not able to make the turn to the east onto Highway No. 92 because of speed; that the car skidded across the intersection and hit a bank at the southeast corner thereof; and that the car rolled over injuring all those in it, which included appellee.

We conclude that under these facts, if believed by the jury, it could properly find appellant was guilty of gross negligence in the operation of his car. The evidence therefore presents a question for the jury. For a comparable situation see Landrum v. Roddy, *supra.*

That part of instruction No. 7 given by the court on its own motion, which is here material, is as follows: "And in this case if you find from a prepondence (preponderance) of the (evidence) that the defendant was grossly negligent in driving his car at an excessive and dangerous rate of speed at the time and place of the accident and that the plaintiff made no protest or objection to the manner of defendant's driving, then the plaintiff cannot recover, ever (even) though you should further find that the accident and injuries to the plaintiff were the proximate result of the defendant's operating his automobile at an excessive rate of speed. If, however, you find from a prepondence (preponderance) of the evidence that the plaintiff did protest at the speed at which defendant was operating his automobile and that he requested the defendant to reduce said speed and that he warned the defendant of the fact that they were approaching the intersection of Highway 11 and

92 and that defendant paid no heed to such warnings and you further find that defendant was grossly negligent in the operation of his automobile and that such negligence was the proximate cause of the accident, then the plaintiff would be entitled to a verdict for such damage as has been shown by the prepondence (preponderance) of the evidence he has sustained."

This instruction had the effect of determining, as a matter of law, that under the situation disclosed by the evidence appellee was required to protest or object to the manner of appellant's driving. It then placed upon appellee, in order for him to recover, not only the burden of proving that appellant was grossly negligent in the operation of his car and that such negligence was the proximate cause of the accident but also the burden of proving that he protested the speed at which the car was being driven; that he requested appellant to reduce the speed thereof; and that he warned appellant of the fact that they were approaching the intersection of Highways Nos. 11 and 92. Such is neither the legal effect of the evidence produced nor the proper party upon whom to place the burden of showing appellee failed to perform any duty he might have as a guest under the facts and circumstances here established.

"The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car." Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228. See, also, Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178.

The first paragraph of instruction No. 7 properly informed the jury of this duty.

"When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable." Landrum v. Roddy, *supra.*

And, "* * * whether or not the conduct of the appellee is such as to defeat any right to recover, to which she may be entitled, is one of contributory negligence * * *." Landrum v. Roddy, *supra.* See, also, Fulcher v. Ike, *supra;* Hendrix v. Vana, 153 Neb. 531, 45 N. W. 2d 429; 61 C. J. S., Motor Vehicles, § 489, p. 107.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394.

If the evidence presents a question of fact for the jury then the following is applicable as appellant pleaded that appellee was guilty of contributory negligence: "If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect." Mundy v. Davis, *supra.*

Appellee testified that after they had started south from Elba on Highway No. 11 at a point about a mile from Elba when appellant was "going pretty fast" he said to appellant, "Bill, slow up, we're in no hurry"; that about three miles south of Elba, when the speedometer showed he was driving 85 miles an hour, he again told appellant to slow up as there was no hurry; that Kenneth Halm, the other guest, made the same request at that time; that at a point about a half mile north of the intersection he noticed by the speedometer that the car

was going 95 miles an hour and at that time again told appellant to slow up; and that when he saw the junction sign he shouted, "Slow up Bill, here is the corner." Kenneth Halm corroborates this story and said that when he saw the junction sign he also shouted for appellant to slow up for the corner. Appellant denied these protests and warnings were made and testified the only warning appellee or Halm made was just before the car entered the intersection when one or both of them said to put on his brakes.

Whether, under the circumstances here, appellee should have made protests or given warnings; whether or not protests and warnings were made; and whether or not if he should have done so and failed such failure was a proximate cause of the accident, are within the province of a jury's functions. We find they present questions for a jury.

As to questions raised by appellee we find exhibit No. 10 was properly admitted, its weight being for the jury.

As to instruction No. 9, since it relates to instruction No. 8 defining statutory duties of a person operating a car on a highway, it should not be in language relating it to "either of the parties to this action." Since appellee was a guest, any negligence of the appellant relating to such operation is not imputable to him.

In view of the foregoing we find the granting of a new trial was proper and the order of the trial court to that effect is affirmed.

AFFIRMED.

JOE SPREITZER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
50 N. W. 2d 516

Filed December 21, 1951. No. 33051.

1. **Indictments and Informations.** An information which apprises the defendant, with reasonable certainty, of the accusation against him so that he may prepare a defense and plead the judgment as a bar to subsequent prosecution for the same offense, meets fundamental purposes of information, as well as constitutional requirements.
2. **Courts: Appeal and Error.** Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done.
3. **Larceny.** In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence.
4. **Juries: Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.
5. **Criminal Law: Appeal and Error.** In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
6. **Trial.** The invalidity of a quotient verdict depends not upon the method of arriving at the verdict or the result reached but on a previous agreement by all of the jurors to be bound by the result of the quotient process. The test to be applied in determining the validity of a verdict which is attacked as a quotient verdict is whether the jury agreed beforehand to be bound by the result reached; the existence of such agreement is the test in both criminal prosecutions and civil actions.
7. **Trial: Juries.** No affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, or to show a mistake in it; or that they misunderstood the charge of the court; or that they otherwise mistook the law; or the result of their finding.
8. ———: ———. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the in-

structions, is incompetent. Such matters are commonly held to inhere in the verdict.

9. **Trial: Criminal Law.** It is proper to charge, and error to refuse to charge, that a reasonable doubt may arise either from the evidence or from a want of evidence, and that the absence of sufficiently satisfying evidence may be a ground for a reasonable doubt of defendant's guilt.
10. **Trial.** It is elementary that in passing upon the validity of part of an instruction, it must be considered not only in the light of all the language used in the particular instruction of which it is a part, but also all other instructions given by the trial court.

ERROR to the district court for Sarpy County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

*Grenville P. North* and *Francis M. Casey,* for plaintiff in error.

*Clarence S. Beck,* Attorney General, *Walter E. Nolte,* and *Clarence A. H. Meyer,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

A jury found plaintiff in error, hereinafter called defendant, guilty of grand larceny. His motion for new trial was overruled, and the trial court sentenced him to be imprisoned in the Nebraska State Penitentiary for two years. Therefrom he prosecuted error to this court, assigning substantially: (1) That the information did not charge an offense under the statute; (2) that the trial court erred in failing and refusing to give him six peremptory challenges; (3) that the verdict was not sustained by the evidence but was contrary thereto and contrary to law; (4) that the jury was guilty of prejudicial misconduct by the manner in which it arrived at the value of the property allegedly taken; and (5) that the trial court erroneously failed to instruct on the law applicable to the case, and in giving instructions Nos. 1, 4, 5, 6, and 13. We conclude that the assignments have no merit.

The statute involved, section 28-506, R. R. S. 1943, provides: "Whoever steals any money or goods and chattels of any kind whatever, whether the same be wholly money, or wholly in other property, or partly in money and partly in other property, the property of another, of the value of thirty-five dollars or upwards * * * shall be imprisoned in the penitentiary not more than seven years nor less than one year."

In the light thereof, we have examined the information and conclude that it did sufficiently charge the offense of grand larceny. The information, insofar as important here, charged that on September 8, 1950, contrary to the form of the statutes in such cases made and provided, defendant "did unlawfully, wrongfully and feloniously and with the intent to steal, did take and carry away from the premises of the Union Pacific Railroad Company at Higgins Crossing in said County of Sarpy, State of Nebraska, property of value, to-wit: Fourteen (14) unused railroad cross-ties of the value of $35.00 and upwards, and being then and there the property of the said Union Pacific Railroad Company."

In Hans v. State, 147 Neb. 67, 22 N. W. 2d 385, this court held: "In charging the commission of an offense in an information, it is not necessary that the exact words of the statute be used, provided the words employed are the equivalent in meaning of those contained in the statutes.

"The court will give the words used in the information their ordinary and commonly accepted meaning, and when viewed in this light, if the words employed mean the same thing as those found in the language of the statute denouncing the offense, the information will be upheld."

In Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717, it was held: "An information which apprises the defendant, with reasonable certainty, of the accusation against him so that he may prepare a defense and plead the judgment as a bar to subsequent prosecution for the same

offense, meets fundamental purposes of information, as well as constitutional requirements."

Only recently this court reaffirmed the rule that: "A complaint or information is fatally defective only if its allegations can be true and still not charge a crime." Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698.

The foregoing rules have application here, and affirm the sufficiency of the information.

For the first time, and that on motion for new trial, defendant complained that the trial court erroneously failed and refused to allow defendant six peremptory challenges. In that respect the record discloses as follows: "MONDAY, MARCH 19th, 1951, 10:00 A. M.: (Jury names drawn by the Clerk, examination for cause by attorneys for Plaintiff and Defendant.) MONDAY, MARCH 19th, 1951, 1:30 P. M.: (Impanelling of jury continued, and challenges exercised by Plaintiff and Defendant.) * * * Jury empaneled and sworn at 2:24 P. M."

It does not appear any place in the record that the court failed or refused to give defendant six peremptory challenges or that defendant requested the same. Rather, the record discloses that he exercised two such challenges, then waived the third, and, without making any request or taking any exceptions, presumptively waived the other three. If the defendant did not exercise all of them, the court was not at fault. It can only be concluded that defendant was satisfied with the jury until it found him guilty, and then, as an afterthought, raised the question without anything in the record to sustain it.

As stated in Nash v. State, 110 Neb. 712, 194 N. W. 869: "The record shows that the jury were duly impaneled and sworn, and, nothing appearing to the contrary, the presumption is that the jury were properly and lawfully selected. * * * The fact appearing in the record that no exceptions were taken to the jury by the defendants indicates that it was a fair and impartial jury, such as the Constitution guarantees to a party.

The defendants were tried by a jury to which they took no exceptions, and this in itself should constitute a waiver of further peremptory challenges."

Also, as held in Hampton v. State, 148 Neb. 574, 28 N. W. 2d 322: "Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done." We conclude that the second assignment of error has no merit.

We turn then to the third assignment, relating to insufficiency of the evidence. In that connection, the record discloses that eye witnesses identified defendant as one of several men who, at the time and place alleged, loaded the 14 new and unused cross ties belonging to the Union Pacific Railroad in a truck identified by description and license number, and hauled them away without the owner's permission. In fact, defendant was identified as the driver of the truck. The ties were soon thereafter located at a feed lot just south of Omaha, on the Fort Crook road, where they were being used by the feeder to build a fence and loading chute. Such feeder, as a witness for the State, admitted that in accord with a prior arrangement, he bought the ties from defendant, paying him therefor the sum of $14. Such witness testified on cross-examination, but over objection by the State, and without any foundation, that on September 8, 1950, he considered that $14 was their fair value. There was competent evidence that defendant admitted to an investigator that, using his own truck, he hauled the ties to the feeder and sold them to him, but claimed that he had overtaken a panel truck driver under a highway overpass and purchased the ties from such truck driver, without knowing who he was or who owned the ties.

The ties were new creosoted railroad cross ties, designed for, purchased by, and belonging to the Union Pacific Railroad Company. They were identified by

such railroad's particular brand or markings on the ties. They were not sold to the public but only to railroads or for the construction of adjoining railroad side tracks. The assistant general purchasing agent of the Union Pacific Railroad, who had served in that capacity for 23 years, and whose duties, among others, was to purchase ties for that railroad, testified that in his opinion the value of the ties when taken was $4 each, which made a total of $56. Contrary to defendant's contention, there was ample and sufficient foundation laid for the admission of such testimony by that witness. Defendant adduced no evidence in his own behalf.

The jury fixed the value of the property as $35. Such value was a question of fact for its determination, and examination of the record discloses that under the evidence it could as well have found that the property was worth more, up to $56.

In Edmonds v. State, 42 Neb. 684, 60 N. W. 957, this court held: "In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence. Following Brooks v. State, 28 Neb., 389." That rule was complied with in every respect in the case at bar.

In Clark v. State, 151 Neb. 348, 37 N. W. 2d 601, this court held: "It is not the province of this court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.

"Where there is substantial evidence sustaining the jury's verdict, it will not be set aside."

In Smith v. State, 153 Neb. 308, 44 N. W. 2d 497, it was said: "The credibility of the witnesses and the weight of their testimony was for the jury to determine and the decision of the jury cannot be disturbed unless

it is clearly wrong. Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602."

It was recently reaffirmed in Phillips v. State, *supra*, that: "In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt."

We conclude that the evidence adduced by the State was amply sufficient to sustain the verdict.

Defendant contended that the jury was guilty of misconduct because it erroneously arrived at the value of the property by adding the evidence given by the two witnesses regarding value, and dividing that sum by two, thereby arriving at a quotient verdict. Upon motion for new trial the affidavits of two jurors so indicating were offered in evidence but refused. We conclude that the trial court properly refused to admit or consider them. Contrary to defendant's contention, there is no showing in this record which would justify any finding that the jury returned a quotient verdict upon the question of value. As stated in 53 Am. Jur., Trial, § 1031, p. 712: "The invalidity of quotient verdicts depends not upon the method of arriving at the verdict, or the result reached, but on the previous agreement to be bound by the result of the quotient process. The test to be applied in determining the validity of a verdict which is attacked as a quotient verdict is whether the jury agreed beforehand to be bound by the result reached; the existence of such agreement is the test in both criminal prosecutions and civil actions."

The applicable rule here is that: "'* * * no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, or to show a mistake in it; or that they misunderstood the charge of the court; or that they otherwise mistook the law, or the result of their finding.'" Hamblin v. State, 81 Neb. 148, 115 N.

W. 850. See, also, Schindler v. Mulhair, 132 Neb. 809, 273 N. W. 217, and Bonacci v. Cerra, 134 Neb. 588, 279 N. W. 314, wherein it was held: " 'An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. Such matters are commonly held to inhere in the verdict.' Palmer v. Parmele, 104 Neb. 30, 175 N. W. 649."

Defendant argued that the trial court erred when it failed to instruct on the law applicable to the case. In that connection, defendant argued that the trial court should have given the jury some measuring stick to use in determining the value of the property allegedly stolen. Instruction No. 12, told the jury: "If you find the defendant guilty beyond a reasonable doubt as charged in the information, it is your province and duty to ascertain and determine the value of the property described in the information and alleged to have been stolen, as shown by the evidence beyond a reasonable doubt to have been taken as charged in the information, and you will state in your verdict such value of the property so taken, although it may not literally be the same value as set forth in the information." In that respect, the court complied with section 29-2026, R. R. S. 1943, which provides: "When the indictment charges an offense against the property of another by larceny * * * the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, * * *."

The information submitted by instruction No. 1 alleged that on September 8, 1950, the property had a value of $35 and upwards. That was the only date involved in the case. All of the material evidence related to that date, and its fair value as of that date. The jury could not have been misled if they determined the value of the property from the evidence adduced, as they were required to do, and the mere failure to use the words "fair and reasonable" in instruction No. 12 could not have been error prejudicial to defendant.

Defendant assigned that the trial court erred in giving instructions Nos. 1, 4, 5, 6, and 13. The complaint with reference to instructions Nos. 1, 5, and 6 was predicated upon the contention that the information did not charge a crime, which we have heretofore concluded has no merit. Therefore, from an examination of the instructions and previous discussion it is apparent that such instructions clearly and correctly stated the law in every respect.

Instruction No. 4 told the jury in part: "By the words 'reasonable doubt' as used in these instructions is meant an actual, substantial doubt of guilt arising in your minds from the evidence *or want of evidence in the case.*" (Italics supplied.) Defendant argued that the italicized words were prejudicial to defendant since he did not adduce any evidence in his own behalf. The contention has no merit. In Trimble v. State, 118 Neb. 267, 224 N. W. 274, this court said: " 'It is proper to charge, and error to refuse to charge, that a reasonable doubt may arise either from the evidence or from a want of the evidence, and that the absence of sufficiently satisfying evidence may be a ground for a reasonable doubt of defendant's guilt.' " See, also, McIntosh v. State, 105 Neb. 328, 180 N. W. 573, 12 A. L. R. 798, and Goemann v. State, 100 Neb. 772, 161 N. W. 421, together with cases cited therein, approving the very instruction here involved.

Instruction No. 13 read in part: "In determining the credibility and weight to be given to the testimony of witnesses, you should take into consideration their interest, if any, in the result of this case; their conduct and demeanor while testifying; their opportunities for seeing and knowing the things about which they testify; and the *probability or improbability* of their testimony." (Italics supplied.) Defendant complained that the words "probability or improbability" used therein, permitted the jury to convict on probable cause, instead of permitting it to determine that which was true and that

which was not true. No authority was cited to support such contention. This court has on a number of occasions approved almost identical instructions. They are correlated in I Corcoran, Nebraska Instructions to Juries (2d ed.), sections 1432, 1433, and 1434, pages 369 and 370.

As generally understood, the words "probability or improbability of their testimony" mean whether their testimony has the appearance of truth or falsehood, that is, whether it is credible or incredible, believable or unbelievable.

As stated in Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858: "It is elementary that in passing upon the validity of part of an instruction, it must be considered not only in the light of all the language used in the particular instruction of which it is a part, but also all other instructions given by the trial court." In the light thereof, we have examined all of the instructions given and conclude that they properly and fairly submitted the issues to the jury.

Other matters are discussed in defendant's brief, but they are entirely without merit, and to discuss them would serve no purpose except to unduly prolong this opinion.

Finding no error in the record prejudicial to defendant, we conclude that the judgment should be and hereby is affirmed.

AFFIRMED.

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BANK OF KEYSTONE, A CORPORATION, APPELLANT, V. IVAN L. KAYTON, APPELLEE.
50 N. W. 2d 511

Filed December 21, 1951. No. 33061.

1 **Automobiles.** The Certificate of Title Act was enacted for the protection of owners of motor vehicles, those holding liens thereon, and the public.

2. **Automobiles: Chattel Mortgages.** The Certificate of Title Act

eliminates the practice of filing and recording chattel mortgages on motor vehicles in the chattel mortgage records, and substitutes the recording of such upon the certificate of title itself.

3. **Automobiles: Liens.** One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles.
4. ———: ———. Under the act relating to certificates of title to motor vehicles, no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the county clerk of the county in which the applicant resides.
5. **Replevin.** The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time.
6. ———. The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced.
7. ———. The law requires that a plaintiff in a replevin case must recover on the strength of his right in or to the property and not upon any weakness of the interest of the defendant therein.

APPEAL from the district court for Deuel County: JOHN H. KUNS, JUDGE. *Affirmed.*

*Firmin Q. Feltz* and *G. B. Hastings*, for appellant.

*Dallas A. Clouse*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action in replevin brought by the Bank of Keystone, plaintiff, against Ivan L. Kayton, defendant, in the district court for Deuel County to obtain possession of a certain 1948 Dodge club coupé or the value of the same if not returned, and for damages and costs. This action is based on a chattel mortgage executed and delivered to the plaintiff bank by John A. Harney, a duly licensed automobile dealer.

The action proceeded to trial before a jury. Upon motion made by the defendant to dismiss the plaintiff's petition, based on the plaintiff's failure to produce sufficient evidence to make a case for the jury, the jury was discharged and the defendant's motion to dismiss was sustained.

The trial court, in substance, made the following findings: (1) That the defendant was a creditor of John A. Harney, a duly licensed automobile dealer; (2) that the defendant had been in possession of the 1948 Dodge club coupé at all times until the same was taken from him by virtue of the action in replevin; (3) that the chattel mortgage dated August 30, 1950, executed and delivered to the plaintiff bank by John A. Harney was not endorsed as a lien on the certificate of title covering the vehicle, nor was the same endorsed upon any certificate of title; (4) that under the terms of section 60-105, R. S. Supp., 1949, and section 60-110, R. S. 1943, no lien was created against defendant even though title had passed from the defendant to John A. Harney; and (5) that defendant was entitled to have the right of possession of the vehicle in question at the commencement of the suit, the value of the same being $800, damages sustained by the detention of the automobile being nominal.

The trial court entered judgment on the findings that defendant was entitled to the immediate possession of the Dodge club coupé or the value of the same in the amount of $800, damages in the sum of one cent, and costs of the action.

The plaintiff filed a motion for new trial. From the order overruling the motion, plaintiff appeals.

For convenience we will refer to the plaintiff as the bank, to the defendant, Ivan L. Kayton, as defendant, and to the automobile dealer John A. Harney as Harney.

It appears from the record that Harney was a duly licensed automobile dealer having a Packard agency in the city of Ogallala. He dealt in both new and used

automobiles. On July 25, 1950, by written contract, Harney sold to the defendant, who resides near Chappell, a new 1950 Packard club sedan, the purchase price being $2,915, with a down payment of $100 by check which he cashed. The defendant was given a trade-in allowance for a 1948 Dodge club coupé which amounted to $1,185, making the total down payment $1,285. Upon delivery of the Packard the defendant was to pay $630 in cash and to give Harney a note for $1,000 with interest at 8 percent due in 90 days. On August 3, 1950, the defendant mailed the certificate of title to the Dodge club coupé to Harney. On August 30, 1950, Harney's bookkeeper, making a business transaction for him with the bank, presented the bank with the following instruments: An installment note executed and delivered by Harney to the bank in the amount of $1,005, payable on October 30, 1950; a chattel mortgage which included therein the 1948 Dodge club coupé as security; two certificates of title; and a power of attorney. One of the certificates of title covered the Dodge automobile here involved. On the reverse side of this certificate of title was an assignment of the Dodge club coupé to Harney, bearing date of August 8, 1950. The reassignment appearing on the certificate of title was in blank, not acknowledged, but signed by Harney.

On July 25, 1950, a power of attorney appointing Harney lawful attorney to assign a certificate of title covering the Dodge club coupé or to make application for a certificate of title was signed by the defendant and delivered to Harney.

The power of attorney and certificate above referred to were in the possession of the bank until introduced in evidence in this case, together with the note and mortgage above referred to. At the time of trial there was due on the debt of Harney to the bank $805.

It was represented to the bank at the time the transaction was had with Harney that the Dodge club coupé was in his possession and free of encumbrances. The

bank did not verify this fact for the reason that it had transacted business satisfactorily with Harney for a period of two years.

Harney died on September 3, 1950. He was insolvent at the time. On September 6, 1950, the plaintiff filed its chattel mortgage in Keith County.

The plaintiff first learned of the location of the Dodge club coupé on September 6, 1950, and that it was in the possession of the defendant. The defendant went to the bank looking for his title on or about September 6, 1950, and asked to see the papers with reference to the transaction had between the parties. He was shown the note, the chattel mortgage, the certificate of title, and the power of attorney. He told the bankers that there was no use denying that his signature appeared on some of the papers. Later in his testimony he denied that he had signed the power of attorney or made any assignment of the title to the vehicle to Harney.

The defendant also testified that Harney was not able to furnish him the 1950 Packard for which he had contracted, but orally agreed to furnish him a 1951 Packard of the same model and on the same terms. The defendant was to mail to Harney the certificate of title to the Dodge automobile which he did on or about August 3, 1950. There was nothing said about a power of attorney. When the transaction was had with Harney by the defendant, he drove the Dodge coupé home and retained the possession of it awaiting delivery of the Packard. It was taken from him in this replevin action instituted on October 16, 1950.

The plaintiff's assignments of error may be summarized as follows: (1) The trial court erred in dismissing the plaintiff's petition at the conclusion of the evidence; (2) the trial court erred in finding the defendant was a creditor of Harney; and (3) the judgment entered by the trial court is contrary to the evidence and the law.

A motion for a directed verdict or dismissal must,

for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence. See, Moncrief v. Interstate Transit Lines, 129 Neb. 168, 261 N. W. 163; Robinson v. Central Neb. Public Power & Irrigation Dist., 146 Neb. 534, 20 N. W. 2d 509.

We bear in mind the foregoing rule in analyzing this appeal.

The trial court found, and properly so, under the factual situation presented that the title to the 1948 Dodge club coupé passed from the defendant to Harney, the licensed dealer.

This appeal involves the act relating to title and transfer of motor vehicles, and provides for the recording of liens and encumbrances on motor vehicles on a certificate of title. This act is found in Chapter 60, article 1, R. S. 1943, and amendments thereto. Certain sections of the act were amended by the 1945 and 1949 Legislatures. See Laws 1945, c. 140, p. 442; Laws 1949, c. 93, p. 249; Laws 1949, c. 179, p. 505.

In support of its assignments of error the plaintiff contends that the provisions of the Certificate of Title Act do not apply to motor vehicles acquired by licensed automobile dealers in this state until such time as the dealer sells such motor vehicle, or vehicles, to a general purchaser or user.

In making reference to certain sections of the motor vehicle act we set forth the material parts of such sections as may be necessary.

Section 60-102, R. S. Supp., 1949, provides that the provisions of this act shall apply to motor vehicles required to be registered under the provisions of sections 60-301 to 60-306, then this section makes exceptions which are not applicable here.

Section 60-302, R. S. Supp., 1949, provides: "Every owner of a motor vehicle shall, for each motor vehicle owned, except as otherwise expressly provided, make application for registration * * *."

The language "otherwise expressly provided" appears in section 60-320, R. S. Supp., 1949, which provides in part: "Each * * * licensed dealer in motor vehicles, doing business in this state, may, in lieu of the registering of each motor vehicle which he owns of a type otherwise required to be registered, * * * operate or move the same upon the streets and highways of this state solely for purposes of transporting, testing, demonstrating, or use in the ordinary course * * * of his business as a * * * dealer, * * * or sell the same without registering each such vehicle upon the condition that any such vehicle display thereon, in the manner prescribed in section 60-323, dealer number plates as provided herein."

The plaintiff makes reference to section 60-104, R. S. Supp., 1949, which provides in part: "No person, except as provided in section 60-103, shall sell or otherwise dispose of a motor vehicle, * * * without delivering to the purchaser or transferee thereof a certificate of title with such assignment thereon as may be necessary to show title in the purchaser, * * *."

Reference is made to section 60-106, R. S. 1943. This section provides for certificate of title, application for, form, evidence necessary, and the duties of the county clerks. The part referred to by the plaintiff provides: "* * * Provided, licensed dealers need not apply for certificates of title for motor vehicles in stock or acquired for stock purposes, but upon transfer of the same they shall give the transferee a reassignment of the certificate of title on such motor vehicle, * * *."

Reference is made to section 60-105, R. S. Supp., 1949, which provides in part: "No person, except as provided in section 60-110, acquiring a motor vehicle, * * * from the owner thereof, whether such owner be a * * * dealer * * * shall acquire any right, title, claim, or in-

terest in or to such motor vehicle, * * * until he shall have had issued to him a certificate of title to such motor vehicle, * * * or delivered to him a manufacturer's or importer's certificate for the same; nor shall any waiver or estoppel operate in favor of such person against a person having possession of such certificate of title * * * for a valuable consideration. No court in any case at law or in equity shall recognize the right, title, claim or interest of any person in or to any motor vehicle, * * * sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued, in accordance with the provisions of this act."

The plaintiff asserts, in view of the foregoing-cited sections of the act, that there is no provision in the act requiring a licensed automobile dealer to procure a new title in his name to or for any motor vehicle acquired by him; that section 60-105, R. S. Supp., 1949, applies only to individuals such as purchasers of automobiles from licensed dealers, and not to licensed dealers; and section 60-110, R. S. 1943, is inapplicable because of the distinction in the various parts of the Certificate of Title Act referring to dealers and others as heretofore indicated.

We are in accord with the plaintiff's reasoning that from the time a licensed automobile dealer acquires a used motor vehicle and has the title assigned and delivered to him by the seller, he is not required to obtain a new certificate of title in his name. When he sells such automobile, then a certificate of title is procured for the purchaser. However, we are not in accord with the plaintiff's reasoning that a licensed automobile dealer is exempt from the Certificate of Title Act insofar as mortgages on motor vehicles are concerned. Section 60-105, R. S. Supp., 1949, and section 60-110, R. S. 1943, of the act apply to dealers as well as to general purchasers or others that may be concerned under the provisions of the act.

We make reference to section 60-110, R. S. 1943, which provides in part that sections 36-207, 36-208, 36-301, 36-302, and 36-303 shall never be construed to apply to or to permit or require the deposit, filing, or other record whatsoever of a chattel mortgage, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract or similar instrument, or any copy of the same covering a motor vehicle.

In Securities Credit Corp. v. Pindell, 153 Neb. 298, 44 N. W. 2d 501, this court held: "The Certificate of Title Act eliminates the practice of filing and recording chattel mortgages on motor vehicles in the chattel mortgage records, and substitutes the recording of such upon the certificate of title itself. * * * Under the act relating to certificates of title to motor vehicles, no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the county clerk of the county in which the applicant resides."

The statute relating to certificates of title to motor vehicles was enacted for the protection of owners of such vehicles, those holding liens thereon, and the public, and one holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles. See Nichols v. Bogda Motors, Inc., 118 Ind. App. 156, 77 N. E. 2d 905.

A holder of a mortgage lien on an automobile owes a duty to see that the mortgagor has complied with the Certificate of Title Act in order to protect such lien, as well as innocent purchasers of automobiles. Securities Credit Corp. v. Pindell, *supra*.

The plaintiff was in a position so that it could reasonably protect its lien by complying with the Certificate of Title Act. It had possession of the certificate of title a reasonable length of time to have its lien noted thereon but instead filed it under the chattel mortgage records.

The following language from Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913, is appropriate: "As stated in Crawford Finance Co. v. Derby, 63 Ohio App. 50, 25 N. E. 2d 306: 'On the other hand, from the whole scheme of the Certificate of Title Act, especially the sections quoted above, it is apparent that the Legislature intended to set up one and only one method by which liens on or titles to a motor vehicle could be acquired. * * *' "

While in the cited case reference was made to the sections quoted therein which are sections 60-104 and 60-105, R. S. Supp., 1949, the foregoing language clearly indicates the method by which a lien on a motor vehicle under the act should be asserted, as provided for in section 60-110, R. S. 1943, that is the method prescribed in the act.

In the case of Alliance Loan & Investment Co. v. Morgan, 154 Neb. 745, 49 N. W. 2d 593, this court held: "A chattel mortgage on a motor vehicle is void as to creditors of the mortgagor unless a notation thereof is made on the face of the certificate of title to the vehicle as required by the applicable statute of the state," which is section 60-110, R. S. 1943. The court further said that the plaintiff could recover only upon the strength of its interest in the property involved and not on any weakness in the interest of the defendant in the property, citing Loyal's Auto Exchange, Inc. v. Munch, *supra*. The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced. The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time.

There was a failure of the plaintiff to produce any evidence of any lien or any interest in the Dodge club coupé as against the defendant at the commencement of this action.

We deem other assignments of error unnecessary to discuss.

We conclude the judgment of the trial court should be, and hereby is, affirmed.

AFFIRMED.

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GUY A. HAMILTON, COUNTY JUDGE OF FILLMORE COUNTY, NEBRASKA, APPELLEE, V. WILLARD H. FOSTER, COUNTY CLERK OF FILLMORE COUNTY, NEBRASKA, ET AL., APPELLANTS.

50 N. W. 2d 542

Filed December 21, 1951. No. 33089.

**Officers: Constitutional Law.** When a statute enacted and in effect prior to the election of a public officer fixes the compensation of such officer upon the basis of population and an increase or decrease in compensation occurs during the officer's term because of a change in population after his election, such increase or decrease in compensation does not violate our constitutional provision that the compensation of a public officer shall not be increased or diminished during his term.

APPEAL from the district court for Fillmore County: STANLEY BARTOS, JUDGE. *Reversed and remanded with directions.*

*John C. Gewacke*, for appellants.

*Guy A. Hamilton*, pro se.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Guy A. Hamilton, as the elected, qualified, and acting county judge of Fillmore County, brought this action in the district court for Fillmore County against the county of Fillmore seeking a declaratory judgment to determine his rights as to salary during his present term of office, particularly since January 1, 1951. The trial court found that when plaintiff took office on January

6, 1949, Fillmore County was classified under section 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199, as class (4) for the purpose of fixing the salaries of its county officers; that section 23-1105, R. S. 1943, as amended by Laws 1947, c. 70, § 4, p. 224, then in effect, provided a county judge in a class (4) county should be paid an annual salary of $2,900; that since January 6, 1949, and during plaintiff's present term of office, the population of the county had decreased so as to make it a class (3) county for the purpose of fixing the salaries of county officers; that such change in population did not, because of the provisions of the Nebraska Constitution, affect plaintiff's salary; and that plaintiff is entitled to be paid a salary of $2,900 during all of his present term of office. The court, in view thereof, awarded judgment against the county accordingly. Defendant filed a motion for new trial and, from the overruling thereof, has appealed.

The facts are stipulated and not in dispute. Appellee was elected county judge of Fillmore County for a term of four years at the general election held on November 2, 1948. He qualified for the office and has been acting in that capacity since his present term began on January 6, 1949.

Prior to November 2, 1948, the board of supervisors of Fillmore County had, by resolution adopted July 28, 1948, determined the population of the county to be more than 13,000 or class (4) for the purpose of fixing county officers' salaries under section 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199. Under this classification the holder of the office of county judge was entitled to receive an annual salary of $2,900 and appellee was paid that salary for the years of 1949 and 1950. See section 23-1105, R. S. 1943, as amended by Laws 1947, c. 70, § 4, p. 224.

On December 21, 1950, the board of supervisors passed a resolution for the purpose of fixing the salaries of county officers wherein it fixed the population of Fillmore

County at 11,693 or class (3) under section 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199. After January 1, 1951, pursuant to this resolution, the county commenced to pay plaintiff $2,100 per annum as provided for by section 23-1104, R. S. 1943, as amended by Laws 1947, c. 70, § 3, p. 223, the salary of a county judge in a class (3) county.

The salary changes effected by the 1949 Legislature (Laws 1949, c. 40, p. 134) and effective August 27, 1949, are not here applicable. Appellee's rights are controlled by the laws in effect at the time he was elected, qualified, and took over the duties of his office. These are sections 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199, and 23-1104 and 23-1105, R. S. 1943, as amended by Laws 1947, c. 70, §§ 3 and 4, pp. 223-4. Ramsey v. County of Gage, 153 Neb. 24, 43 N. W. 2d 593. See, County of Yuma v. Sturges, 15 Ariz. 538, 140 P. 504; State ex rel. Moss v. Hamilton, 303 Mo. 302, 260 S. W. 466; State ex rel. Harvey v. Linville, 318 Mo. 698, 300 S. W. 1066.

Therefore the singular question presented by the appeal is, what was the effect, if any, of the reclassification of Fillmore County on December 21, 1950, upon the salary of the county judge during the balance of the term of office he was then serving?

The Constitution provides for the office of county judge and fixes his term of office at four years and provides his "salary shall be fixed by law." Article V, section 15, of the Constitution of Nebraska.

The statute in effect at the time appellee was elected and took office fixed his salary at the sum of $2,900 per annum. Section 23-1105, R. S. 1943, as amended by Laws 1947, c. 70, § 4, p. 224.

Article III, of the Constitution of Nebraska relating to legislative power provides by section 19 thereof, as amended in 1920, that: "The Legislature shall never grant any extra compensation to any public officer, agent or servant after the services have been rendered

nor to any contractor after the contract has been entered into, *nor shall the compensation of any public officer,* including any officer whose compensation is fixed by the Legislature subsequent to the adoption hereof *be increased or diminished during his term of office.*" (Italics ours.)

We said of this section in Ramsey v. County of Gage, *supra*: "It was designed to protect the individual officer against legislative oppression and, further, to curb the activities of public officers in lobbying to induce the Legislature to increase salaries. By the amendment the people simply said that the Legislature shall not increase or diminish the compensation of any public officer during his term of office, and that this inhibition should include any, and therefore all, public officers whose compensation is fixed by the Legislature." See, also, State ex rel. Randall v. Hall, 125 Neb. 236, 249 N. W. 756.

It is appellants' thought that since the classification statute for the purpose of fixing county officers' salaries, being section 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199, was in force and effect when appellee was elected and took office that it does not come within the inhibitions of Article III, section 19, of the Constitution of Nebraska, as amended in 1920, and that when the board of supervisors passed the resolution of December 21, 1950, a salary change came into effect by operation of law and that appellee took his office subject thereto. This precise question has apparently never been answered by this court. It was raised in Shambaugh v. Buffalo County, 133 Neb. 46, 274 N. W. 207, and Shambaugh v. Buffalo County, 137 Neb. 434, 289 N. W. 873, but, for reasons therein stated, it was not necessary to determine it.

An annotation of this subject will be found in 139 A. L. R. 737. Therein, at page 742, referring to a "Statute enacted before officer's appointment or election, automatically increasing or decreasing salary upon

change in population or assessed valuation during term," it states: "In a majority of jurisdictions in which the question has been considered, it is held that such an increase or decrease brought about solely because of a change in the population or assessed valuation does not violate the constitutional inhibition."

Basically, "In the absence of any constitutional prohibition, or affirmative provision, fixing the term of office of any officer or his compensation, the legislature may change such term or compensation, and such change of term or compensation will apply as well to the officers then in office as to those to be thereafter elected." County of Douglas v. Timme, 32 Neb. 272, 49 N. W. 266. See, also, County of Yuma v. Sturges, *supra*.

Of the cases examined, which includes all those cited by the parties, we find the courts follow the majority rule when the constitutional provision involved is like our own.

In County of Yuma v. Sturges, *supra*, under a constitutional inhibition upon the Legislature like ours, it was said:

"It is at once seen that the constitutional restriction is an abridgment of the law-making power to either increase or diminish that compensation of the officer during his term, and which was prescribed for and as an incident to the office at the beginning of his term; that during his term of office the public officer enjoys exemption from legislative interference and control over the amount of his compensation, and at the same time has a curb put upon his activity in the direction of an increase of compensation, whether such activity be worthy or pernicious. In fine he may devote his attention to the performance of his official duties, unembarrassed by any feeling that his worth is being niggardly rewarded in money, and the offspring of such a feeling which usually moves in the direction of increased compensation. At the same time there is the counterpart which attends him with a security from the wretched

thought that others may become imbued with the conviction that his stipend is much too large for one of his capacity, and thus move with the pruning-hook by way of economy in the public funds, or that desire which might in time find congenial soil in the breast of a people desiring to get rid of an officer altogether, and to that end take away that compensation which he hath.

"The matter of paramount importance here, then, is to ascertain what compensation was fixed or prescribed by law when the term of office of the appellee commenced."

The court then found: "When his term of office began, his compensation was definitely fixed and prescribed according as the assessed valuation of the county may be ascertained, if less than $9,000,000 a certain sum, and if $9,000,000 and over a certain sum; the fluctuation not being occasioned by any subsequent legislative action, but by operation of the very law in force and effect and controlling the compensation of the office at the beginning of appellee's term of office—by the operation of that law automatically."

It held: "Under the classification in force when appellee went into office, Yuma county was a county of the first class, with an assessed valuation less than $9,000,000; his compensation was therefore fixed at $2,200 per annum. In August, 1913, Yuma county, while still remaining a county of the first class, nevertheless its equalized assessed valuation became more than $9,000,000, and appellee's compensation was therefore fixed at $2,500 per annum. Not by virtue of any subsequent legislative action, but solely by the automatic operation of the very law in effect at the beginning of the term, and which law definitely prescribed and fixed the compensation incident to the office, the amount thereof being graded according to the determination of an extraneous fact, to wit, the fact of the equalized assessed valuation. * * * The constitutional inhibition has no application here, and the judgment of the lower court

awarding appellee compensation for the month of September, 1913, in the sum of $208.33, being at the rate of $2,500 per annum, is correct."

In State ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 39 N. E. 2d 840, 139 A. L. R. 728, under a constitutional provision like ours, the court stated the question involved as follows: "The question presented by the respondent's demurrer is whether a statute, effective before the commencement of the term of a common pleas judge, whereby his compensation is automatically increased during the term by reason of the increase of the population of his county as shown by a federal census effective after the beginning of the term, is in conflict with Section 14, Article IV of the Constitution, * * *." It then states: "The purpose of the constitutional inhibition now under consideration is to make sure that the judge and the electorate are advised before he is appointed or elected what his compensation will be, with the assurance that it cannot be changed by the Legislature during the term; that the judge is precluded from using his personal influence or official action to have the Legislature increase his salary; and that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins. These same salutary purposes are fully and effectually preserved by the terms of the present statute, albeit the compensation of the judge is made variable, from and after the last federal census becoming effective during his term." And holds: "The inhibition, according to the language of the Constitution thus directed to the Legislature, is that it shall not by legislative act during his term diminish or increase the compensation of any common pleas judge. Such compensation must be fixed before his term begins, but there is no inhibition against the Legislature fixing such compensation before the term begins on a basis which may vary it in amount as time advances, provided that basis, within the contemplation and understanding of both the

judge and the people who elect him, is fixed, certain and unchangeable during his term. Such action upon the part of the Legislature does not thereby sanction or attempt to legalize an evil or vice which the Constitution prohibits."

Other cases discussing the question and arriving at the same conclusion are Puterbaugh v. Wadham, 162 Cal. 611, 123 P. 804; State v. Hamilton, *supra;* State v. Linville, *supra;* Board of Commissioners v. Crowe, 214 Ind. 437, 14 N. E. 2d 907, on rehearing 214 Ind. 441, 15 N. E. 2d 1016; State ex rel. Jaumotte v. Zimmerman, 105 Mont. 464, 73 P. 2d 548.

We have held:

"* * * the question in respect of the population of the state, or of the population of any of its subdivisions, is purely a question of fact to be determined by the court the same as other fact questions." Gordon v. Lowry, 116 Neb. 359, 217 N. W. 610.

"What the number of inhabitants may be is a question of fact which must be determined by some competent authority. The duty of settling with county officers, auditing their accounts, fixing the salaries of their deputies, as well as the general management of the affairs of the county, rests upon the county board. Before they can perform the duties devolved upon them by law, it becomes necessary that some determination should be made of the number of inhabitants of the county in order to classify the officers. * * * And where the board of county commissioners in good faith ascertain and determine the number of inhabitants of a county for the purpose of classification of the county officers, such determination is not subject to collateral attack, but is conclusive as to those to whom it applies until set aside or vacated by such county board or some other forum of competent jurisdiction in a direct proceeding instituted for that purpose." Buffalo County v. Bowker, 111 Neb. 762, 197 N. W. 620.

"The salary of the county attorney for any year de-

pends upon the number of inhabitants of the county during that year, and that fact is to be determined, as are other facts in litigation, by the best competent evidence that can be adduced under the circumstances." O'Connell v. Sioux County, 94 Neb. 826, 144 N. W. 779.

"By the provisions of the foregoing statute, the plaintiff was entitled to receive an annual salary, the amount of which depended upon the population of defendant county during each year that plaintiff served as county treasurer." Shambaugh v. Buffalo County, 137 Neb. 434, 289 N. W. 873. See, also, Shambaugh v. Buffalo County, 133 Neb. 46, 274 N. W. 207.

We are of the opinion that when a statute enacted and in effect prior to the election of a public officer fixes the compensation of such officer upon the basis of population and an increase or decrease in compensation occurs during the officer's term because of a change in population after his election, such increase or decrease in compensation does not violate our constitutional provision that the compensation of a public officer shall not be increased or diminished during his term. It is a factual and not a legislative change.

When appellee was elected to, qualified for, and took over the duties of the office of county judge, section 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199, provided for the classification of counties by population for the purpose of fixing the salaries of county officers. The law in effect at that time fixing the salaries of county officers according to their classification was Chapter 70, Laws 1947, p. 221. Since Fillmore County was at that time a class (4) county the salary of the county judge was fixed by section 4 of Chapter 70, Laws 1947, p. 224, at the sum of $2,900 per annum. Appellee was properly paid this salary for the years of 1949 and 1950. However, on December 21, 1950, the board of supervisors determined the population to be 11,693. The validity of this determination is not questioned. This resulted in Fillmore County becoming a class (3) county

for the purpose of fixing the salaries of its county officers. Consequently, under section 3 of Chapter 70, Laws 1947, p. 223, the salary of the appellee for the remainder of his term, or for the years 1951 and 1952, became $2,100 per annum.

In view of the foregoing we find the judgment of the trial court to be in error and it is reversed and the cause remanded with directions that it enter a judgment in accordance herewith, that is that appellee for the balance of his term, or for the years of 1951 and 1952, is entitled to a salary of $2,100 per annum.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., dissenting.

The majority opinion in this case finds support in decisions from some jurisdictions. In other jurisdictions an opposite viewpoint has been expressed. It is but fair to say that in the jurisdictions wherein the question has been considered the majority hold to the view expressed in the majority opinion herein.

With that view I cannot agree and in consequence I respectfully dissent.

Article III, section 19, of the Constitution of Nebraska to the extent that it is important here is the following: "The Legislature shall never grant any extra compensation to any public officer, agent or servant after the services have been rendered nor to any contractor after the contract has been entered into, nor shall the compensation of any public officer * * * be increased or diminished during his term of office."

In the words employed in this provision, taken either in or out of context or in relation to any other constitutional provision, I fail to find any confusion or ambiguity. The language to me is simple, plain, and clear and thus, under rules so well known that citation of authority therefor would be superfluous, it is entitled to be accorded its common and ordinary meaning. It says, and I cannot escape the belief that it means, that *the com-*

*pensation of no public officer shall be increased or diminished during his term of office.*

As I interpret, this county judge was entitled to receive without increase or decrease the salary which was appropriate under law at the commencement of his term of office.

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STATE OF NEBRASKA EX REL. WESLEY BINTZ, APPELLANT, V. NEBRASKA STATE BOARD OF EXAMINERS FOR PROFESSIONAL ENGINEERS AND ARCHITECTS ET AL., APPELLEES.
50 N. W. 2d 784

Filed January 4, 1952. No. 33030.

**Mandamus.** A court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Affirmed.*

*Matthews, Kelley, Fitzgerald, Matthews & Delehant,* for appellant.

*Clarence S. Beck,* Attorney General, and *Walter E. Nolte,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

This is a mandamus action wherein plaintiffs sought to require "defendants, and each of them, to execute, issue, and deliver to your relator, Wesley Bintz, a Certificate of Registration to practice professional engineering in the State of Nebraska." Defendants demurred generally to the petition for the reason that it did not state a cause of action upon which the court could issue a writ of mandamus. Their demurrer was overruled and defendants answered, wherein, among other defensive

grounds they renewed their contention that plaintiff's petition did not state a cause of action. Plaintiff's reply was a general denial.

After a lengthy hearing upon the merits, the trial court rendered its decree, denying the relief prayed and dismissing plaintiff's petition. Plaintiff's motion for new trial was overruled, and he appealed, assigning, insofar as important here, that the judgment was contrary to law. We conclude that the assignment should not be sustained.

It appears from the record that on January 16, 1945, plaintiff filed an application for a certificate of registration. However, after full inquiry, and in the exercise of its discretion based upon the facts presented, defendant board of examiners denied plaintiff's application on August 2, 1945. Plaintiff did not prosecute error therefrom, and such denial became final. Whether or not such denial was an abuse of discretion cannot be determined in this mandamus action. Plaintiff alleged that subsequently, on September 7, 1949, defendants refused to accept the filing of another application, but in this action he does not pray that defendants should be required to do so. Rather herein plaintiff asked the district court, and upon appeal asks this court, to require defendants to issue a certificate of registration, thereby controlling defendant board's discretion. In other words, plaintiff has undertaken in this action to require the courts to administer the law and exercise a discretion committed by law to defendant board of examiners. It is well established that such a mandamus action cannot be maintained.

In support of his action, plaintiff relied upon Downs v. Nebraska State Board of Examiners, 139 Neb. 23, 296 N. W. 151. An examination of that opinion discloses that such action was in mandamus to require the Nebraska State Board of Examiners for Professional Engineers and Architects to issue plaintiff Downs a certificate of registration without an examination. In such

case this court affirmed the issuance of a peremptory writ in the light of an applicable "Grandfather Clause" contained in section 71-3309, C. S. Supp., 1939, same being section 9 of Legislative Bill No. 14, enacted by the 1937 session of the Nebraska State Legislature, which specifically provided that in such case "* * * the Board shall issue a certificate of registration, without written or oral examination, in Engineering or Architecture, * * *." It is apparent that such case is not in point here, and has no application under applicable statutes. Plaintiff here makes no claim that he was entitled to a certificate under such a "Grandfather Clause" as a matter of right. Rather, he is prosecuting this mandamus proceeding to control discretion as distinguished from ministerial action.

In State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N. W. 2d 297, relied upon by plaintiff, we allowed a writ of mandamus because the statute sought to be enforced left "open no area for the exercise of a discretion. It requires the performance of a purely ministerial duty." It was specifically held therein that: "When a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus." Clearly that case has no application in the case at bar.

In that connection, section 81-839, R. R. S. 1943, provides in part: "In order to safeguard life, health and property, any person practicing or offering to practice the profession of engineering or architecture in this state shall be required to submit evidence that he is qualified so to practice, and shall be registered as provided in section 81-847."

Section 81-841, R. R. S. 1943, provides that a State Board of Examiners for Professional Engineers and Architects should administer the provisions of sections 81-839 to 81-856, R. R. S. 1943. Thereafter, section 81-847, R. R. S. 1943, provides in part: "The Board of

Examiners for Professional Engineers and Architects shall, upon application therefor on a prescribed form and upon the payment of a fee of fifteen dollars to be paid in the manner prescribed below, issue a certificate of registration (1) to any person who submits evidence satisfactory to the board that he is fully qualified to practice professional engineering or architecture; or (2) to any person who holds a like unrevoked certificate of registration issued to him by proper authority of the National Council of State Board of Engineering Examiners, or of the National Bureau of Engineering Registration, or of the National Council of Architectural Registration, or any state or territory of the United States or any country where the requirements for the registration of professional engineers or architects are not lower than the standards specified in this section and section 81-848; Provided, however, that no person shall be eligible for registration who is under twenty-five years of age, or who is not of good character and repute, or who has not been actively engaged for at least eight years in the practice of professional engineering or architecture of character satisfactory to the board."

Clearly, upon the filing of an application for a certificate of registration as an engineer or architect, defendants were required under such statutes to examine evidence and exercise a discretion based thereon.

In that connection, this court held in State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341, that: "The discretion of a public officer cannot be controlled by mandamus, but when a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus.

"Where a specific duty is provided by statute mandamus may be invoked to enforce it, if denied; and the party entitled to such relief will not be forced to

pursue his remedy by a circuitous and dilatory action at law."

In State ex rel. Strange v. School District, 150 Neb. 109, 33 N. W. 2d 358, this court held: "The court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency.

"A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown." See, also, State ex rel. Evans v. Brown, 152 Neb. 612, 41 N. W. 2d 862.

The foregoing rules are controlling here. We conclude, therefore, that the trial court should have sustained defendants' demurrer and not heard the case upon its merits, because plaintiff's petition did not state a cause of action upon which the court could grant the relief prayed.

Other matters are assigned and argued in the brief, which, as we view it, require no discussion or decision.

For the reasons heretofore stated, we conclude that the judgment should be and hereby is affirmed.

AFFIRMED.

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EMANUIL WISKOCIL ET AL., APPELLANTS, V. WILLIAM KLIMENT, APPELLEE.
50 N. W. 2d 786

Filed January 4, 1952. No. 33040.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Trusts.** The foregoing rule is not abrogated by, but must be construed in the light of, the rule that the burden of proof is upon one seeking to establish and enforce a constructive trust

to establish the same by a preponderance of evidence, clear, satisfactory, and convincing in character.

3. ———. Where one employed to act as agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property for his principal as upon a constructive trust, although he purchased with his own money subject to reimbursement for his proper expenditures in that behalf.

4. **Frauds, Statute of: Trusts.** The statute of frauds, sections 36-103 and 36-104, R. S. 1943, does not apply to a constructive trust growing out of an undertaking by one person to purchase property for another, where in violation of his agreement he has taken and retained the title in his own name or otherwise for himself, and refuses to convey after tender of the agreed purchase price, or the balance thereof remaining unpaid.

APPEAL from the district court for Saunders County: H. EMERSON KOKJER, JUDGE. *Reversed and remanded with directions.*

*Phillip A. Tomek* and *John G. Tomek,* for appellants.

*H. A. Bryant,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiffs brought this suit in equity to cancel a deed to 240 acres of described farm land, have title quieted thereto as against defendant, and for an accounting. Defendant denied generally plaintiffs' right of recovery, and prayed for dismissal of the action. After a hearing upon the merits, the trial court rendered its decree, finding generally for defendant, substantially upon the ground that defendant's promise to purchase the land for plaintiffs and convey it to them upon repayment of the balance of the purchase price was oral, thus within the statute of frauds, and that in any event the promise had been withdrawn. Nevertheless, the decree permitted plaintiffs to have an accounting, and ordered that each party should pay his own costs. Plaintiffs' motion for new trial was overruled, and they appealed, assigning

that the judgment was not sustained by the evidence but contrary thereto and contrary to law. We sustain the assignments. Hereinafter, plaintiffs, when spoken of separately, will be respectively called Emanuil and Joseph.

In such cases, the general rule is that: "Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. R. S. 1943, subject, however, to the rule that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478. In that regard, however, the version accepted must be supported by credible evidence. In other words, this court is not required by such rule to believe the unbelievable. See, also, Maddox v. Maddox, 151 Neb. 626, 38 N. W. 2d 547, wherein it was held: "The foregoing rule is not abrogated by, but must be construed in the light of the rule that the burden of proof is upon one seeking to establish and enforce a constructive trust to establish the same by a preponderance of evidence, clear, satisfactory, and convincing in character."

Bearing that in mind, we have examined the record. It discloses that plaintiffs are unmarried brothers. They were both born on the land involved, and lived there all their lives working and farming the land. Plaintiffs did not know the date of their birth or the date of the death of their parents, but it appears that Emanuil was about 45 and Joseph was over 60 years of age at the time of trial. They had but little education, and their physician, who had personally known them for four or five years, testified that from his professional examinations, technical mental tests, and observation, Emanuil, born mentally incapacitated and subject to influence, had the mental capacity of a child seven or

eight years old, and that Joseph had the slightly higher mental capacity of a child eight or nine years old. He classified both of them as low morons. An unmarried brother, who lives with plaintiffs, is physically unable to work, and "not right in the head," having lost his mind in 1942.

On December 9, 1936, plaintiffs jointly owned the land involved. However, on that date Emanuil, who was the record title owner, gave the Prudential Insurance Company, hereinafter called the company, a mortgage on all the land to secure a 10-year loan of $11,400, with interest and $500 on the principal, both payable annually. Years of drought, poor crops, and low prices made it impossible for them to make the payments in 1938. Thereupon the company started foreclosure proceedings, and on February 18, 1944, it received a sheriff's deed to the land.

Prior thereto plaintiffs negotiated with the company to repurchase the land. They later made a written offer to purchase the same for $15,600, and paid the company $1,000 as part payment thereof. The offer was approved and accepted by the company in writing on June 7, 1944.

In the meantime, plaintiffs proceeded to secure the money with which to pay the company. They were able to raise but $4,100 in cash. To raise the balance of $11,500 they entered into an oral agreement with a neighbor, one Dolezal, whereby he was to purchase for himself one 80 acres of the land, and loan plaintiffs sufficient additional money to complete their purchase of the other 160 acres. However, Dolezal was to take a deed to all the land as security for his loan to plaintiffs. Plaintiffs desired to keep all the land for themselves, but nevertheless, pursuant thereto, Joseph and Dolezal went to Omaha and separately made written offers to the company, duly accepted, whereby Emanuil was to purchase a described 160 acres of the land, and Dolezal was to purchase a described 80 acres thereof. The lat-

ter's offer, as provided therein, was "made with the understanding that the sale of" the other described 160 acres "to Emanuil Wiskocil is to be completed in conjunction with this sale. In event said sale to the said 160 A. is not consumated (sic) this offer to be cancelled," which statement, together with other evidence adduced, verified plaintiffs' testimony with regard to such transaction.

Shortly thereafter, defendant, an apparently friendly near neighbor, who often came to plaintiffs' farm borrowing tools and visiting with or advising them, went to see plaintiffs. Having heard about their arrangements with Dolezal, defendant then and there told them to cancel the arrangement and not have anything to do with Dolezal, because he would never permit plaintiffs to pay the loan and would never reconvey the land to plaintiffs as promised, but that he, defendant, would advance the money needed and purchase all of the land for plaintiffs. Defendant said he would see Dolezal for them, so plaintiffs went with defendant in his car to see Dolezal and there informed him that the deal with him was cancelled, and to meet them in Omaha at the company's office at an appointed time and cancel their contracts. At such appointed time defendant took Joseph with him in his car to Omaha, where they met Dolezal in the company's office and such contracts were cancelled, upon defendant's promise that he would make an offer and enter into a contract to purchase all of the land from the company for plaintiffs, pay the balance above what plaintiffs could raise, take title as security therefor, turn the land over to plaintiffs as owners, and convey it to them when he was paid, with interest at 4 percent.

In pursuance thereof defendant executed a written offer to purchase the land for $15,600. The offer was on a regular printed form, but therein, with regard to the right to possession by defendant, there had been typed a separate sentence to the effect that it was "subject to

the rights of the parties now in possession." The offer was accepted, whereupon plaintiffs paid $4,100 directly to the company upon the purchase price, and received a receipt therefor from the company. Defendant paid $11,500 and received a warranty deed to all the land on July 25, 1944. He never then or thereafter offered plaintiffs any security for the $4,100 paid by plaintiffs, or offered to pay interest thereon as if it were a loan to him.

The promises heretofore recited as made by defendant were reiterated by him in his car on the road back home. Twice during the trial defendant admitted that he had made the same, and after this suit was started he told plaintiffs he would give them 80 acres if they would drop the case.

There the matter rested for sometime until the spring of 1946. During all of the period here involved, plaintiffs maintained and retained full and complete possession and dominion over all the land as owners. They rented part of the land to defendant, and as directed by defendant, collected and retained pasture rents. Without direction of or at his request, plaintiffs, at their own expense, repaired and made permanent and substantial improvements to the fences, buildings, and land.

During 1945, plaintiffs paid defendant $614.78 in cash to apply on principal, interest, and taxes. Likewise, in April 1946, they paid him $300 in cash. Likewise, on October 16, 1946, they paid him $500 by check, which check appears in the evidence bearing defendant's endorsement. That payment defendant admitted receiving, and the trial court specifically found that all the aforesaid payments had been made by plaintiffs and credited such amounts to them in the accounting.

In the spring of 1946, defendant secured permission from plaintiffs to farm 23 plowed acres of the land which had been previously planted to sweet clover for two years, upon the promise that he would credit two-fifths rent share of crops raised thereon by him upon prin-

cipal, interest, and taxes paid by him. Under that arrangement defendant thereafter continued to rent from plaintiffs and farm such land. In 1946 such two-fifths share received by him amounted to $1,395.34. In 1947 such crop share, plus one-half the hay taken by defendant from 60 acres, as per oral agreement with plaintiffs, amounted to $1,194.75. In 1948 such share amounted to $890, and in 1949 it amounted to $900. The trial court specifically found that such amounts should be credited to plaintiffs in the accounting.

On April 8, 1946, defendant, being in ill health and believing he might die, came to plaintiffs' home and took them in his car to Wahoo, where, in order to do the right thing, as he had agreed, defendant delivered Emanuil a warranty deed to all the land, which deed was duly recorded. The consideration recited therein was "One Dollar and Love and Affection." At the time of its execution, plaintiffs paid defendant in cash the one dollar consideration recited in the deed, and, at his request, gave him all the money they had, $300 in cash, an amount for which the trial court gave them credit in the accounting. Whether plaintiffs were to get a loan and pay defendant the balance then due him as contended by defendant, or could pay him the balance little by little, as contended by plaintiffs, is of little importance in light of the fact that he did give them a deed as he had promised to do.

Thereafter, however, on April 24, 1946, defendant again came to plaintiffs' farm, where by promises, force, and threats, he induced plaintiffs to go with him in his car to Wahoo, where Emanuil deeded the land back to defendant, who told them not to tell anybody about the transaction or worry, because the farm was still theirs, and they thereafter continued in possession as such at all times in the same manner heretofore recited. The consideration recited in that deed was also "One Dollar and Love and Affection" and there was no other consideration recited or given by defendant.

Defendant in one breath contended that the $4,100 paid by plaintiffs directly to the company was a loan to him at 4 percent, although no interest was ever paid thereon by defendant and no security was ever asked, offered, or given therefor, and in the next breath contended that it was by oral agreement with plaintiffs for rent of the land paid in advance, at five dollars per acre. However, in the light of his own testimony, buttressed by unequivocal facts and circumstances, it appears conclusively that it was neither the one nor the other, but rather was in fact money "advanced on purchase price of land" by plaintiffs, as found and credited by the trial court in its decree of accounting. Likewise, defendant's general denial of plaintiffs' testimony and his equivocal contention that he purchased the land solely for himself and not for plaintiffs, and that he had at all times dealt fairly with them upon that basis, lacks any credence, and a court of equity will not permit defendant to so fraudulently enrich himself at plaintiffs' expense.

Plaintiffs were ultimately able to raise sufficient money to pay defendant in full, which he refused to accept. This action was brought and payment thereof was tendered into court for defendant's benefit. Both plaintiffs and defendant offered evidence with regard to an accounting. The lapse of time and failure of both parties to keep adequate and complete records, makes exactness difficult, but plaintiffs admitted that at the time of trial they were indebted to defendant in the sum of $8,843.11, for principal, interest, and taxes, and in the light of the evidence we conclude that such sum was the correct amount then owing defendant.

In the light of such a situation as that heretofore recited, the law is well established.

In Scott v. Swank, 132 Neb. 720, 273 N. W. 25, this court held: " 'Although mental weakness may fall short of entire incompetency to transact business, if it is taken advantage of to procure a conveyance by inequitable

means, the conveyance may be set aside.' Bennett v. Bennett, 65 Neb. 432, 91 N. W. 409.

" 'A court of equity will scrutinize jealously a transaction as to which there is ground for holding that influence has been acquired over a person of weak mind, and has been abused.' " See, also, Bennett v. Bennett, 65 Neb. 432, 91 N. W. 409.

On the other hand, it has long been the rule that: "The statute of frauds can only be invoked to avoid an oral contract in case one is free from deceit and false representations." Griffin v. Bankers Realty Investment Co., 105 Neb. 419, 181 N. W. 169. See, also, Hecht v. Marsh, 105 Neb. 502, 181 N. W. 135, 17 A. L. R. 1, and Dickson v. Stewart, 71 Neb. 424, 98 N. W. 1085, 115 Am. S. R. 596. In such last-cited case it is said: "And he also overlooks another very important proposition: That a court of equity will never permit a party to shield himself behind a statute of frauds in order to perpetrate a fraud." See, also, Koefoed v. Thompson, 73 Neb. 128, 102 N. W. 268.

In any event the statute of frauds has no application here. In Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637, this court said: " 'A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.' O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540. See, also, Wilcox v. Wilcox, 138 Neb. 510, 293 N. W. 378; Box v. Box, 146 Neb. 826, 21 N. W. 2d 868; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; 1 Restatement, Trusts, p. 5, § 1e.

"The law is well established that each case is to be determined from the facts, circumstances, and conditions as presented therein. See, Damkroeger v. James, 95 Neb. 784, 146 N. W. 936; Lennox v. Anderson, 140

Neb. 748, 1 N. W. 2d 912; Lunkwitz v. Guffey, 150 Neb. 247, 34 N. W. 2d 256.

"Sections 36-103 and 36-104, R. S. 1943, constitute a part of the statute of frauds. The former section recognizes the creation of an interest in land 'by operation of law.' The latter section provides that section 36-103 shall not be construed in any manner to prevent any trust from arising by implication or operation of law. Thus, trusts arising by implication or operation of law are excepted from the operation of the statute of frauds. See, O'Shea v. O'Shea, *supra;* Pollard v. McKenney, *supra.*"

In Lamb v. Sandall, 135 Neb. 300, 281 N. W. 37, following Johnson v. Hayward, 74 Neb. 157, 103 N. W. 1058, 5 L. R. A. N. S. 112, this court held: " 'Where one employed to act as the agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money, subject to reimbursement for his proper expenditures in that behalf.' " See, also, Maddox v. Maddox, *supra.*

In Johnson v. Hayward, *supra,* it was also held: "A contract whereby one person employs an agent to negotiate for the purchase of real estate is not a contract for the creation of an estate or interest in land, or trust or power over or concerning lands, etc., within the meaning of the statute of frauds."

In the light of the foregoing evidence and rules we conclude that plaintiffs have clearly established a constructive trust, and that for the reasons heretofore stated the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to render a judgment in conformity with this opinion, requiring defendant to convey the land to plaintiffs by a warranty deed, or, upon his failure or refusal to do so, the deed of April 24, 1946, shall be cancelled and title to the land quieted in plaintiffs absolutely

against all claims of defendant, upon condition that plaintiffs shall pay $8,843.11, together with interest thereon at 6 percent from date of judgment on the mandate, into court for defendant's benefit, within 60 days from date of judgment on the mandate. All costs are taxed to defendant, both in this court and in the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

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CENTRAL CONSTRUCTION COMPANY, A CORPORATION, APPELLEE, V. GUY E. HIGHSMITH ET AL., APPELLANTS.
50 N. W. 2d 817

Filed January 4, 1952. No. 33046.

1. **Trial.** Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment.
2. **Estates.** It is a general rule that where two unequal estates vest in the same person at the same time, without an intervening estate, the smaller is thereupon merged in the greater.
3. ———. But merger does not always or necessarily result from such a coinciding of such estates.
4. ———. Whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected.
5. **Mechanics' Liens.** Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged.
6. ———. The object of the mechanics' lien law being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.
7. ———. Where a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to give credit for payments made, the law will not aid him in enforcing his lien. On the other hand, if the errors are trifling and immaterial, or if they are readily explainable as the result of

mistake, and no element of willfulness appears, regard will be had for the imperfections of human machinery, and the recovery of a just debt will not be denied where nothing but fair dealing was intended.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Reversed and remanded with directions.*

*W. A. Ehlers,* for appellants.

*Fraser, Connolly, Crofoot & Wenstrand, R. G. Fraser,* and *Hird Stryker,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action for the foreclosure of a mechanic's lien. The matter was tried upon an amended petition and answer of the defendants Ehlers. From a decree generally favorable to the plaintiff, the defendants Ehlers and Mitchell appeal. We reverse the judgment of the trial court and remand the cause with directions.

The plaintiff is a construction company engaged in the remodeling of houses. The defendants Margaret C. Ehlers and William A. Ehlers are husband and wife. As will be set out later, certain deeds and instruments were made and delivered wherein Mrs. Ehlers was grantee and assignee. The record shows that Mr. Ehlers handled this entire transaction relating to him and his wife. For convenience these defendants will be referred to as the Ehlers, Mr. Ehlers, or Mrs. Ehlers as the fact appears. It further appears that defendants Mitchell are in possession of the property under a contract with the Ehlers. Where necessary the defendants Mitchell will be referred to herein as the Mitchells.

We are first confronted with a question as to issues. Toward the close of the trial a question arose as to whether or not the Mitchells were parties to the action and, if so, in default. Mr. Ehlers contended that he had an-

swered for the Mitchells. The trial court said: "* * * if the pleadings are not in proper form and their names are not in the heading, he may have leave to ammend (sic) his pleadings to conform to the proof." That occurred on November 2, 1950. On November 22, 1950, after the evidence had been all taken and the cause submitted to the court, Mr. Ehlers, as attorney for himself, Mrs. Ehlers, and the Mitchells filed an amended answer in which he made the Mitchells answering defendants. In this amended pleading he changed in several respects his answer as to the defenses of the Ehlers and also alleged that the plaintiff had sold and assigned its interest in the claim prior to the perfecting of the alleged mechanic's lien and that it had no lien. Plaintiff does not appear to have challenged this pleading. The transcript does not show the filing of a reply.

Appellants now contend that there being no reply denying or explaining affirmative allegations of defense, such allegations are admitted as true.

We discuss this contention no further than to point out that the rule is: "Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment." Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251. See, also, Hunter v. Weiner, 103 Neb. 538, 172 N. W. 521; In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675.

The next contention is that plaintiff's petition does not state a cause of action against these appellants or any of them and that the trial court should have so found. It does not appear that the sufficiency of the petition was tested by demurrer or otherwise. The propositions advanced in support of this position are also advanced as to the sufficiency of the evidence to sustain a decree for the plaintiff. They will be determined in that connection.

The real property involved in this action is a lot with a house thereon in the city of Omaha. It is agreed that

as of August 1, 1946, the legal title to this property was in Wholesalers Adjustment Company, a corporation. On that date it entered into a contract to sell this property to one Guy E. Highsmith for $1,300, of which $500 was paid down and the balance of $800 with interest was to be paid in monthly installments of $15, beginning on September 1, 1946. Highsmith went into possession. On October 1, 1946, he paid $30; on November 1, 1946, he paid $15; on December 7, 1946, he paid $15; on March 8, 1947, he paid $20; and on April 15, 1947, he paid $30. On October 3, 1946, Highsmith executed a mortgage on this property to secure a promissory note for $280, payable in monthly installments of $20. The mortgagees were John L. and Juanita L. Bilby. This mortgage was recorded October 4, 1946. It does not appear what, if any, payments were made by Highsmith on the debt.

There is evidence that the Wholesalers Adjustment Company dissolved on or about January 18, 1947, and that one Howard became the holder of this property. The evidence is quite inconclusive on the matter. In the evidence plaintiff and defendants both treat the adjustment company as a going concern after that date. In June 1947, the insurance was paid and charged to the Highsmith account. On September 24, 1947, Howard paid the taxes. The trial court found that the adjustment company was a dissolved corporation. No assignments of error are made here as to that matter.

It also appears that in February 1947, the representative of Howard, using the name of Wholesalers Adjustment Company, began to ask, then to urge, then to demand, that the delinquent payments, the insurance, and the taxes be paid. As late as September 9, 1947, Highsmith was notified by letter that if settlement in full of the contract was not made within five days from the date of receipt of the letter the matter would be placed with an attorney to start action.

Mr. Ehlers testified that in November or December 1946, he was approached by a representative of the ad-

justment company with a proposition to buy this contract for Mrs. Ehlers and that "* * * I suggested that I would foreclose the contract for him if he so desired." All the evidence is that Highsmith was not then in default on the contract. He further testified that in December he agreed that "my wife would buy the contract." Mr. Ehlers offered in evidence a resolution of the board of directors of the adjustment company showing that on January 18, 1947, the officers had authorized conveyance of the property to Mrs. Ehlers, "Assignee of Guy E. Highsmith," for the consideration of $1,300. He further testified that on January 18, 1947, an assignment of the Highsmith contract was made to Mrs. Ehlers. This appears in the bill of exceptions as having been acknowledged before Mr. Ehlers as a notary public. It was recorded as of October 11, 1947. He also testified that on January 18, 1947, the Wholesalers Adjustment Company executed a warranty deed conveying this property to Mrs. Ehlers. It is acknowledged and recorded, as was the contract. It further appears by Mr. Ehlers' testimony that the deed was held by the representative of the adjustment company until early October 1947, when Mr. Ehlers paid Howard $769.70, the balance then due on the contract, including insurance and taxes, received the assignment and deed, among other things, and had them recorded. Prior to October 1947, the Ehlers had no interest in the property.

On October 11, 1947, Highsmith executed a quitclaim deed conveying this property to Mrs. Ehlers, the deed reciting that it was given to convey all right, title, and interest which the grantor had by virtue of the land contract. This deed was also recorded October 11, 1947. Mr. Ehlers testified that the consideration for this conveyance was $100, and that he secured this deed in order to avoid the necessity of a foreclosure proceeding.

On October 14, 1947, the Bilbys executed a release of the Highsmith mortgage. The release was recorded January 28, 1948. Mr. Ehlers testified that he paid for

the mortgage release, although the amount paid is not shown.

On January 16, 1947, Highsmith entered into a contract with plaintiff for the construction of a porch to the house for the recited consideration of $1,180, payable in monthly installments of $37.29. The contract provided that "FHA charge per year is to be added to above cost of labor and materials and is included in the monthly payments." Also on January 16, 1947, Highsmith made application to Universal C.I.T. Credit Corporation for a loan, the proceeds to be used for the above improvement.

Plaintiff entered upon the work covered by the contract. On March 28, 1947, Highsmith executed an "FHA Title I Borrower's Completion Certificate," and plaintiff an "FHA Title I Dealer's Completion Certificate." These certificates were on printer's forms directed to the Universal C.I.T. Credit Corporation. The mechanic's lien here involved was executed on April 25, 1947, and recorded May 29, 1947. Attached to the lien form was a copy of the contract with Highsmith. It recited that it was for work done and labor performed under a written contract for Highsmith, Wholesalers Adjustment Company, and the Bilbys; that when the contract was made the adjustment company was the owner, Highsmith was purchaser under contract, and the Bilbys claimed an interest by reason of a mortgage; that the first item was furnished January 16, 1947, and the date of the last item was April 18, 1947; that there was due the amount of $1,180; and that the plaintiff claimed a lien for that amount.

A witness testified that the actual work under the construction contract began on January 23, 1947. He testified from memory that the completion date was February 1 to 5, or February 10, and later checked his office records and said the completion date was March 28, 1947.

The evidence upon which the contention of a sale of the claim is based will be set out later herein.

The trial court found generally for the plaintiff, and held that plaintiff had a valid lien for the amount claimed against the interest of Highsmith in the property, and that it was entitled to a foreclosure of its lien. The court further found that the sum of the interest of defendants Ehlers in the property was $1,049.70. The court decreed that there was due defendants Ehlers the sum of $1,049.70; that there was due the plaintiff the sum of $1,180, together with interest at 6 percent from January 16, 1947; that in default of the payment of said sums with costs within 20 days, the property be sold as upon execution; and that the proceeds be applied: First, to the payment of defendants Ehlers' interest in the amount of $1,049.70; second, to the payment of costs; and, third, to the payment of the sum of $1,180, together with interest, to plaintiff, and the balance to be distributed to defendants as their interests appear.

The defendants here present a series of alleged errors in the findings and decree.

Defendants contend that Highsmith had no title which could become subject to any lien in favor of the plaintiff. This is based on a provision in the Highsmith contract which gave the adjustment company at its option the right to cancel the contract for failure to make monthly payments and the contention that the contract was in fact forfeited on January 1, 1947. There is and could be no contention here that the adjustment company or Howard ever forfeited or undertook to declare a cancellation of the contract. On the contrary, the evidence shows conclusively that they at all times treated the contract as in force, undertook to secure its performance, and accepted payments thereon. Not only that, but Mrs. Ehlers as assignee of Highsmith performed the contract, paid Howard the amount due under the contract, and secured performance of it. The assignment of error as to that question is devoid of merit.

The next assignment relates to the contention of the defendants that the trial court erred in holding that the defendants Ehlers were lienholders of the property and the companion contention of the Ehlers that in fact they were titleholders. With this contention we agree.

In Peterborough Savings Bank v. Pierce, 54 Neb. 712, 75 N. W. 20, we held:

"It is a general rule that where two unequal estates vest in the same person at the same time, without an intervening estate, the smaller is thereupon merged in the greater.

"But merger does not always or necessarily result from such a coinciding of such estates.

"Whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected."

In various ways we have restated these rules down to and including Watson v. Dalton, 146 Neb. 86, 20 N. W. 2d 610.

In their answer defendants claimed title both by reason of the assignment of the Highsmith contract and the adjustment company deed, and also by the Highsmith deed. They prayed that the mechanic's lien be found null and void.

Mr. Ehlers testified that he agreed that Mrs. Ehlers would purchase the contract. The board resolution which he offered recited that Mrs. Ehlers was the assignee of Highsmith. Mr. Ehlers testified that he paid the amount due under the contract and obtained the adjustment company deed. By deed from Highsmith, Mrs. Ehlers secured whatever interest he had in this property and performed the Highsmith contract. A clear intention to merge the titles is shown. The equities all require that it be held that a merger of the adjustment company's legal title and Highsmith's equitable title occurred when Mrs. Ehlers acquired both estates. It fol-

lows that the trial court erred in decreeing the payment to the Ehlers of the $1,049.70 out of the proceeds of the sale.

Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged. Harte v. Shukert, 94 Neb. 210, 142 N. W. 517. It further follows that the mechanic's lien, if valid, is a lien on the fee title shown to be held by Mrs. Ehlers.

This brings us to appellants' contention that under section 52-101, R. S. Supp., 1949, there is no lien except by virtue of a contract with the owner and that, they being the owners of the legal title and there being no contract with appellants, there is no liability on their part for the Highsmith debt. The lien claimed here is one based on a contract with Highsmith, the owner of an equitable interest in the property, which attached by merger, if valid, to the fee. The plaintiff here seeks to enforce a lien against the property. The plaintiff does not seek to make defendants liable for the debt. There is no merit in the contention.

This brings us to appellants' contention that the claimed lien is not valid. This is based on four contentions: (1) The statement of the names of the persons for whom the work was done was false in that it included not only Highsmith but also the adjustment company and the Bilbys with whom plaintiff had no contract; (2) the statement that the first item was furnished January 16, 1947, when the evidence shows that it was furnished January 23, 1947; (3) the statement that the date of the last item was that of April 18, 1947, when the initial evidence was some date early in February and finally March 28, 1947; and (4) the statement that there was due at the date of the claimed lien $1,180, when appellants claim the evidence shows that plaintiff had sold its claim, had received its money from the credit corporation, and had nothing due it on April 25,

1947, the date the lien was executed, or on May 29, 1947, the date the lien was recorded.

The rule is that "The object of the mechanics' lien law being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions." Way v. Cameron, 94 Neb. 708, 144 N. W. 172. See, also, Johnson v. Olson, 132 Neb. 778, 273 N. W. 201.

It is also the rule that "* * * where a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to give credit for payments made, the law will not aid him in enforcing his lien. On the other hand, if the errors are trifling and immaterial, or if they are readily explainable as the result of mistake, and no element of wilfulness appears, regard will be had for the imperfections of human machinery, and the recovery of a just debt will not be denied where nothing but fair dealing was intended." Consolidated Stone Co. v. Union P. R. R. Co., 96 Neb. 521, 148 N. W. 318. See, also, Rivett Lumber & Coal Co. v. Linder, 113 Neb. 567, 204 N. W. 77.

We consider the first three of these four contentions together. We conclude that they are trifling and immaterial errors within the above rule and do not in anywise affect the validity of the lien.

This brings us to the fourth contention above stated. We direct attention to the provisions above recited from the Highsmith contract with plaintiff with reference to the FHA charges, to the credit application of Highsmith to the credit corporation, and to the completion certificate of Highsmith and the dealer's completion certificate on printed forms directed to the credit corporation. We direct attention also to the fact that there is no contention

here as to the amount originally due plaintiff from Highsmith under the contract, and no contention that Highsmith paid any part of it.

On direct examination, a witness for plaintiff was asked as to payments, if any, made on the Highsmith contract with plaintiff. He replied that "This contract was sold with" the investment trust and they "know more about it than I do." Later, in answer to a question as to the completion of the work, he testified that they received a completion certificate; that the completion certificate was necessary "to obtain money" from the investment trust and "we turn in our note and completion certificate and they pay us," and again "that the completion certificate cannot be sent in for a purchase until the work is completed"; and that "time has to elapse for approval by the finance company." On cross-examination, this witness testified that plaintiff "assigned this claim" and "got our money from the Commercial Credit" on March 28, 1947, and that plaintiff did not own "this property" on April 1, 1947. Later on redirect examination, this witness referred to a promissory note signed by Highsmith. It was marked as an exhibit and offered in evidence, but not received on Mr. Ehlers' objection that there was no connection shown between it and the mechanic's lien. The witness then testified that the note was "discounted." It was again offered in evidence and a ruling reserved. Later on cross-examination of another witness, the defendants developed that the note was for $1,356.75. Thereafter the offer of the note was withdrawn.

There also is evidence of plaintiff that the mechanic's lien was "assigned" to the credit corporation, and that it was "ultimately and eventually abandoned and assigned back." An instrument purporting to be the "assignment back" was offered in evidence. Ruling was reserved on the offer and, as nearly as we can determine, the instrument never was received in evidence. There is evidence that it was dated October 31, 1947. Accord-

ingly, the terms and provisions of the note and "assignment back" are not before us as evidence for consideration here.

It is apparent that this evidence got into the record as the initial result of the effort of the plaintiff to establish the date of the completion of the work and the absence of payments under the contract. Loose language was used. With the exceptions stated, the written evidence that would show the facts was not produced.

It is as a result of this situation that the defendants Ehlers now undertake to defeat the lien on the contention that the plaintiff had sold its claim before the execution and recording of the mechanic's lien. We find no indication in the court's decree or in the motion for a new trial that this particular issue was urged to the trial court. The court did make a finding generally for the plaintiff and specifically found that the affidavit and the account filed as a mechanic's lien were correct and true.

This evidence indicates that the general plan was that Highsmith was to pay this debt through a loan from the credit corporation; that as a part of that plan a note was given; that plaintiff discounted or pledged the note to the credit corporation as a part of the financing of the transaction and received its money thereon; that the plan was not consummated; that plaintiff had not transferred its interest in the claim so as to lose its inchoate lien right but rather retained and exercised that right; and that as a part of that it assigned the perfected lien to the credit corporation and later secured a reassignment of the lien. The evidence offered does not relate to the status of the claim on either the date of the execution or the recording of the mechanic's lien. The best evidence was in part not offered and when offered it was not received, but that which sustains these conclusions rises as high as that upon which the Ehlers rely. It would be a patent injustice to defeat the enforcement of this lien on this evidence and under the

circumstances appearing here. We agree with the conclusion of the trial court as to the validity of the lien.

The judgment of the trial court is reversed and the cause remanded with directions to enter a decree finding that there is due the plaintiff on the lien the sum of $1,180, with interest, and, if not paid, the property be sold as provided by law and the proceeds be applied: First, to the payment of costs; second, to the amount found due the plaintiff; and the balance, if any, to the defendants as their interests appear. All costs in both district court and this court are to be taxed to defendants Ehlers.

REVERSED AND REMANDED WITH DIRECTIONS.

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MARK W. STANLEY, APPELLEE, V. FRANCES STANLEY, APPELLANT.
50 N. W. 2d 558

Filed January 4, 1952. No. 33047.

**Divorce.** In a divorce action wherein a divorce has been granted and the custody of children has been fixed, if the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree as it concerns the care, custody, and maintenance of the children or any of them.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Affirmed.*

*Baskins & Baskins*, for appellant.

*Crosby & Crosby*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

An action was instituted in the district court for Lincoln County, Nebraska, on April 28, 1949, by Mark W.

Stanley, plaintiff, against Frances Stanley, defendant, for divorce. On July 15, 1949, a decree was entered granting the plaintiff a divorce and the custody of a minor child of the parties. The child was born February 6, 1948. Its name is Mark Allen Stanley. On November 8, 1950, the defendant filed a petition in the action wherein she prayed for an order modifying the decree by granting to her the custody and control of the minor child. She also prayed for an order for support and maintenance of the child. By appropriate pleadings issue was joined and a trial was had. By decree all relief prayed for was denied. The original decree was however modified so as to grant to the defendant the right of reasonable visitation. A motion for new trial was filed which was duly overruled. From the decree and the order overruling the motion for new trial the defendant has appealed.

Numerous assignments of error appear as grounds for reversal but the sole proposition requiring consideration is that of whether or not under the facts as disclosed by the record and appropriate principles of law the court erred in allowing the custody and control of the minor child of the parties to remain with the plaintiff.

The propriety of the original award of custody to the plaintiff is not brought into question. The basis upon which the request for change is made is that there have been changed conditions which make desirable the transfer of custody to the defendant. The request is brought under section 42-312, R. S. 1943, which is as follows: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." See Blue v. Blue, 152 Neb. 82, 40 N. W. 2d 268.

There is no substantial contention that the plaintiff

has not, from the time that he received the custody of this child, within his ability and capacity provided the best possible care. His devotion to the child and its welfare has been complete and to say the least highly commendable. Since then he has remarried and in addition to his own devotion he now has a wife who has and manifests a high devotion to the child's welfare.

It is true that plaintiff and his wife are not people of large means or income but plaintiff does have a net annual income of from $4,000 to $5,000 from an established business which he owns and operates. These people live in modest quarters but there is nothing in the record from which a reasonable inference could be drawn that anything does or could flow therefrom detrimental to them or to the child. They expect, according to the record, as time and circumstances will permit to improve their condition in this respect and to provide opportunity for outdoor play and recreation for the child. The prospect for the future welfare of this child with them is altogether attractive and in keeping with the standards and traditions of people of like circumstances. The child is in good health, is well cared for, and is apparently happy in the hands of its father and his present wife against whom according to the entire record there is no reproach.

Insofar as the plaintiff is concerned there is no changed circumstance which would justify the removal of this child from his custody. If there are changed circumstances or if anything has occurred which in the best interests of the child would justify a change it must be found with relation to the defendant.

In this connection from the record little is to be ascertained as to defendant's conduct following the decree of divorce. Near the time the decree of divorce was entered the defendant spirited the child from the jurisdiction of the court. Plaintiff caused its return. Just how is not made clear. Since defendant's departure on that occasion she never returned to this state nor at-

tempted to see the child until the hearing on the petition herein. It is disclosed that before her own divorce decree became final she married her present husband who was not divorced from a former wife. Later after her divorce became final and he obtained a divorce these parties were legally married. Apparently from the date of the illegal marriage until the date of the valid one they conducted themselves as husband and wife. Finally about nine months before the hearing herein they bought a nice home and some acreage outside of Tyler, Texas. At this place they reside with a son of the husband by a former marriage. The husband testified to a taxable income of about $20,000 a year. He has riding horses for the pleasure of his family. Neighbors from Texas gave testimony as to the qualities they observed in the defendant and her husband. This testimony was favorable but none was an intimate friend or person who had known them except for the time they had lived in the home mentioned, at Tyler, Texas.

Little more can be said in favor of the requested change than that the defendant is the mother of the child; that she desires custody; that her husband is more affluent than the plaintiff; and that the proposed new environment is more physically attractive.

This is not regarded as a sufficient change of circumstances to justify an award of the custody of this child to the defendant.

The decree of the district court is affirmed.

AFFIRMED.

JENNIE R. FOSTER, APPELLANT, V. ATLAS LUMBER COMPANY, A CORPORATION, DOING BUSINESS AS GORDON LUMBER AND COAL COMPANY, ET AL., APPELLEES.

50 N. W. 2d 637

Filed January 4, 1952. No. 33077.

**Workmen's Compensation.** Mere exertion, which is not greater than that ordinarily incident to the employment, which combined with pre-existing disease produces disability, does not constitute a compensable accidental injury.

APPEAL from the district court for Sheridan County: EARL L. MEYER, JUDGE. *Affirmed.*

*Lloyd H. Jordan* and *Charles A. Fisher,* for appellant.

*Joseph H. McGroarty,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action under the Workmen's Compensation Act brought by the widow of an employee of the defendant. It presents two questions. Did the employee suffer an accident within the meaning of the Workmen's Compensation Act and, if so, did death result from the accident? The matter was heard before a judge of the compensation court and the claim was dismissed. The matter was next heard before the compensation court sitting en banc and the cause was dismissed. It was appealed to the district court and dismissed. It is here on appeal. We affirm the judgment of the trial court.

The defendant offered no evidence.

Plaintiff's evidence was that the deceased was a man 62 years of age and in general good health. He had some hypertension and was 10 percent overweight. In 1917, he had had an operation for appendicitis followed by an incisional hernia.

For many years the deceased had been the manager of defendant's lumber yard at Gordon. His work was

mostly office work. However, he did anything about the yard that was required, including such work as loading of lumber and cement.

On September 20, 1949, he went with a customer in a car to a warehouse some two blocks from the office and there helped sort out, as to color, paint that the customer purchased. The paint was in cans in cartons weighing 50 pounds or more. The customer and the deceased each carried one carton to the customer's car—a distance of 150 feet. They returned and, at the customer's suggestion, deceased held open the warehouse door while the customer carried out three more cartons of paint. The customer said the deceased may have carried out a second carton, but he does not think so. They then got into the car and started back to the office. On the way deceased said, " * * * I've got kind of a pain in my stomach." Shortly thereafter at the office yard he was observed to be in apparently great pain, sweating and vomiting. He told witnesses he had "hurt" himself lifting paint. He was taken home. His wife was absent, was located, and reached home shortly thereafter. Deceased was abed in pain. He told his wife that he had "hurt" and "strained" himself in lifting paint. A doctor was called by deceased's wife. During the course of his treatment deceased told the doctor, "I got sick after lifting a case of paint and I got to vomiting."

The doctor reached a diagnosis of strangulated incisional hernia. The doctor testified that the cause of a piece of bowel being caught in the incisional hernia was some sort of increased pressure in the abdomen and that pain and the other symptoms would follow almost immediately. Deceased did not respond to treatment. He was operated on the next day and the diagnosis was confirmed. Deceased made a normal recovery. He was ambulatory after four days. On October 1, 1949, he was discharged from the hospital. He walked, with assistance, to his car, and from the car into his home. He

collapsed before reaching his bed and died in a few minutes. The doctor gave the cause of death as an embolus —"a blood clot, which apparently struck one of the major arteries in the heart"; that he assumed the clot came from the healing area of surgery; that a definite diagnosis of the cause of death could not be made without an autopsy; and that none was performed.

Plaintiff contends that the deceased suffered an accident within the meaning of subdivision (2) of section 48-151, R. S. Supp., 1949, and argues that the lifting of the paint caused the strangulated hernia; the operation was necessary to relieve that situation; the embolism and the death were the result of the operation; and hence she is entitled to recover.

The statements of the deceased as to having hurt and strained himself lifting the paint were admitted over objection. Defendant contends that they were hearsay and not admissible. Plaintiff contends that they were admissible and to be considered under the res gestae rule. We do not deem it necessary to determine that question. Assuming, but not deciding, that one or more of the statements were admissible, they show only the result of a cause stated by the deceased to have been the lifting of the paint. They point only to that as a cause. No other cause is indicated in the evidence. The lifting of the paint was within the duties ordinarily done by the deceased.

Subdivision (2) of section 48-151, R. S. Supp., 1949, provides: "The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."

We have repeatedly held that "Mere exertion, which is not greater than that ordinarily incident to the employment, which combined with pre-existing disease produces disability, does not constitute a compensable acci-

dental injury." Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1. The rule is applicable here.

The judgment of the trial court is affirmed.

AFFIRMED.

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LILLIAN WAGOUN, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD, APPELLEE.
50 N. W. 2d 810

Filed January 4, 1952. No. 33078.

1. **Appeal and Error.** An appeal from an order of the district court granting a motion for a judgment notwithstanding the verdict requires this court to consider the entire record and to determine whether it does or does not justify the action of the trial court.
2. **Fraud.** A person may not be held responsible for misrepresentations not made, authorized, or participated in by him.
3. **Agency.** The authority of a person to act for and bind another is a question of fact. There is no presumption of its existence.
4. **Fraud: Release.** Misrepresentation of a material fact made by a person representing a releasor and relied and acted upon by him does not constitute a basis for avoidance of the release of a claim for personal injuries unless the misrepresentation was also made on the authority or with the knowledge of the releasee.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

*Mecham, Stoehr, Moore, Mecham & Hills,* for appellant.

*J. W. Weingarten* and *W. P. Loomis,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellant sued appellee for damages on account of personal injuries claimed to have been sustained by her because of negligence of appellee. Appellant was at the time she received the alleged injuries an employee of

appellee, an interstate common carrier, and she based her action on the provisions of the Federal Employers' Liability Act. 45 U. S. C. A., § 51, p. 118.

At the conclusion of all the evidence, appellee requested the court to instruct the jury to return a verdict for it. The motion was denied. The jury returned a verdict for appellant and judgment was rendered and entered for her and against appellee for the amount of the verdict. Appellee moved the court to set aside the verdict, vacate the judgment, and render a judgment of dismissal of the case notwithstanding the verdict, or, in the alternative, to grant the appellee a new trial of the case for the reasons assigned in that part of the motion. The motion for a new trial was denied and the motion for a judgment for appellee was sustained. This appeal challenges the correctness of the judgment of dismissal of the case.

The petition of appellant sufficiently alleged a cause of action against appellee for the recovery of damages because of injuries negligently caused her on April 18, 1946, while she was performing services for appellee within the scope of her employment in cleaning and conditioning equipment used regularly by appellee in its interstate transportation business.

Appellee in bar thereof pleaded that in June 1947, appellant made claim against it for the injuries described in the petition and claimed to have been sustained by her on April 18, 1946, while employed by appellee; that it on August 15, 1947, compromised and settled all claims and demands made by appellant, including the cause of action alleged in her petition; that she released appellee from all liability to her by instrument in writing duly executed and delivered; and that appellee paid to her and she received and accepted at that time and for that purpose, $3,000 as full and sole consideration for the compromise, settlement, and release.

Appellant by reply asserted that the attorneys of Minneapolis, Minnesota, employed by her on account of her

claim against appellee, solicited the employment; that they conspired with appellee to obtain a settlement of her claim; that in furtherance of the conspiracy they willfully and falsely represented to her that they had ascertained that she would be physically able to return to work within a month; that she would be given and have the right to return to the position she had with appellee on April 18, 1946, the date of the accident, with full seniority rights; that she would be paid $3,000; that each of these matters was contained in an instrument presented to her for her signature; that she could not and did not read the instrument; that it was incorrectly read to her by her attorney; that she relied and acted upon the information given her as aforesaid, and because thereof she signed the instrument pleaded and relied upon by appellee as a release herein; that said instrument did not contain any of the terms and provisions stated to her as the basis of the settlement, except the fact that she would be paid $3,000; that appellee refused to restore her to her seniority rights; that appellant has been disabled continuously since April 18, 1946; that when she learned the falsity of the representations made to her as alleged, she tendered return of the money received by her and has continued the tender thereof; and that the release was without consideration, was obtained by fraud, and as the result of a mistake of fact.

It was the province and duty of the district court, in the situation presented by the record after the motion for a judgment notwithstanding the verdict was made, to re-examine the entire material evidence, and if it was found insufficient to support the verdict to sustain the motion, to set aside the verdict, and to render a judgment of dismissal of the case. The appeal requires this court to consider the entire record and determine the correctness or incorrectness of the conclusion of the trial court that the evidence was not sufficient to sustain the verdict returned and the judgment rendered thereon. § 25-1315.02, R. R. S. 1943; Krepcik v. Interstate Transit Lines,

152 Neb. 39, 40 N. W. 2d 252; Hamilton v. Omaha & Council Bluffs St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

Appellant was employed by appellee as a passenger coach and mail car cleaner. She was the victim of an an accident and suffered injuries on the 18th day of April 1946, while cleaning a mail car used by appellee in the conduct of its interstate transportation business. More than a year thereafter she was located and solicited by a representative of the law firm of Davis, Michel, Yaeger and McGinley of Minneapolis, Minnesota, to employ them to represent her in presenting and pressing her claim on account of the accident against appellee, and on the 21st day of June 1947, this firm by instrument in writing was engaged by her to prosecute her claim to settlement or judgment.

These attorneys for more than 20 years before and including 1947 specialized in the procurement, settlement, and trial of personal injury and death claims of railroad employees arising under the Federal Employers' Liability Act. Their clients were confined to claimants or plaintiffs. They were never engaged by, and never represented any railroad company, and in particular they never in any manner represented or acted for the Chicago, Burlington & Quincy Railroad Company. They were regional counsel for the Brotherhood of Railroad Trainmen. Included in its membership were conductors, brakemen, switchmen, switch tenders, flagmen, and trainmasters. The members of the law division, the members of the claim department, and management personnel of railroad companies were not members of the Brotherhood. The contact of the representative of the law firm and appellant resulted from a suggestion of an alleged switchman of appellee who was a member of the Brotherhood to the representative to call appellant and discuss her matter. The alleged switchman was not more definitely identified, his name was unknown, and he could not be located.

C. S. McGinley, a member of the Minneapolis law firm,

handled the claim after the contract of employment was made by appellant. He notified appellee by letter of June 23, 1947, that his firm represented her. The original letter was sent to F. L. Given, assistant general adjuster of appellee at Omaha, and a copy of it was sent to Tom Smiley, general adjuster at Chicago. This is the first communication of any kind or character the firm, McGinley, or any other person connected with that firm had with appellee or any representative of it concerning appellant or any matter in which she was interested. The second communication was about August 1, 1947, when McGinley and Smiley discussed the claim of appellant but reached no conclusion concerning it. Given had charge of the settlement and adjustment of personal injury claims against appellee arising at Omaha and on its lines west of that city, a fact known to the Minneapolis law firm. Sometime after the McGinley and Smiley conversation, McGinley talked with Given by telephone and asked him if he could and would come to Minneapolis on a specified date for a discussion of the claim of appellant looking towards a possible settlement thereof, and in that conversation he was advised that appellant would then be in that city on the date named.

Given went to Minneapolis, and saw and negotiated with McGinley concerning a settlement of the claim. He was there two days. He and McGinley met and negotiated at different times during those days. The result of the negotiations was that Given finally offered $3,000 as a compromise settlement and discharge of all claims of appellant against appellee, and no other thing or consideration. Sometime after the offer was made, McGinley advised him that appellant would accept the offer as made. A release to that effect was prepared by Given and left with McGinley. Appellant executed it and Given delivered to McGinley a check of appellee for $3,000, payable to the order of appellant and her attorneys, and McGinley surrendered the release of appel-

lant to Given. The check was endorsed by the payees and cashed.

Given was the only person who in any way acted for appellee in reference to the claim and settlement thereof after notice from McGinley that his firm had been employed by appellant, except the conversation had by Smiley with McGinley. Given did not meet or communicate with appellant and was not in her presence until long after the settlement of her claim on August 15, 1947. He, or any other person connected in any way with appellee, made no offer or representation to appellant or her attorneys, or any of them, that appellee would employ appellant after the settlement in any capacity or for any purpose, or that her seniority rights as an employee of appellee would be restored and continued. Appellant produced no evidence that anyone other than McGinley made any such offer, statement, or representation. The offer given and made in the settlement of the claim was $3,000 to appellant as the sole and full consideration for the final disposition and release of all her claims against appellee. The release executed by appellant correctly recites and evidences the offer of settlement as made and consummated on the 15th day of August 1947. Any statement or representation contrary to the terms of the release made to appellant was by McGinley outside of the presence and without the knowledge of Given or any other representative of the railroad company. It is not even claimed in this case that the unidentified switchman with whom the solicitor for the Minneapolis attorneys claimed to have talked made any such statements. There is no evidence to support the allegations of the reply that the settlement and release of the claim of appellant was the result of fraud, misrepresentation, or mutual mistake.

A person may not be held liable for fraudulent representations not made, authorized, or participated in by him. Spies v. Stein, 70 Neb. 641, 97 N. W. 752; Atlas Land Co. v. Hendriks, 298 F. 589; Loverin v. Kuhne, 94

Conn. 219, 108 A. 554, 33 A. L. R. 848; Humphrey v. Baron, 223 Iowa 735, 273 N. W. 856; 37 C. J. S., Fraud, § 61, p. 346; 23 Am. Jur., Fraud and Deceit, § 184, p. 1006.

The responsibility of appellee for any misrepresentations made by McGinley to appellant rests on the claim that appellee conspired with the Minneapolis attorneys in general and with McGinley in particular, and that these attorneys were employed to and did represent appellee. The only evidence from which appellant deduces these conclusions is that the representative of the Minneapolis attorneys received a suggestion from an employee of appellee that the representative call appellant and discuss her matter. The employee was identified and characterized only as a switchman and a member of the Brotherhood of Railroad Trainmen. Beyond that there is nothing to show his status, duties, or authority. Without more than appears here it must be concluded that he had the duty and authority to act in the switching of railroad rolling equipment and none whatever to handle claims against or engage lawyers for appellee. The whole theory of the Minneapolis attorneys or any of them representing and conspiring with appellee, as well as the contention that the settlement of the claim by appellee was procured by fraud, is without support except the oft-repeated assertion thereof in the argument of appellant. The authority of one person to speak or act for and bind another is a question of fact. There is no presumption of its existence. Anyone relying on the act of one claimed to be an agent has the burden of proving authority of the agent. In Meier v. Geldis, 148 Neb. 234, 26 N. W. 2d 813, it is said: "The question of agency is one of fact and there is no presumption of its existence. The party alleging the existence of the agency relationship assumes the burden of proving the agent's authority and that the acts of the agent, for which liability against the principal is sought, must be shown to be within the scope of the agent's authority." See, also, Bartholomew v. Skelly Oil Co., 144 Neb. 51, 12 N.

W. 2d 122; Trephagen v. City of South Omaha, 69 Neb. 577, 96 N. W. 248, 111 Am. S. R. 570.

The principle involved in the doctrine that misrepresentations concerning the nature and extent of the injury made by the physician of a releasor do not constitute a basis for avoidance of the release of a claim for personal injuries because the releasee is not responsible for the representations or advice of such physician is applicable to the situation in this case. Colorado Co. v. Huntling, 66 Colo. 515, 181 P. 129, was an action to set aside a release on the grounds of fraud, misconduct, and undue influence, and to recover damage for personal injuries. The court said the allegations of fraud, misconduct, and undue influence: "If intended to apply to Drs. Allen and McKinnie, they are without force until sufficient evidence be adduced to justify the jury in finding that these doctors were in the employ of the company. The proof here not only fails, but conclusively shows the contrary. Plaintiff's first employment of an adviser was that of Judge Orr, her attorney. Through him she employed Dr. Allen. Through Dr. Allen, she employed Dr. McKinnie. * * * If the physician referred to is Dr. Allen, then no advice given by him and no reliance placed upon his representations can form any basis for the recovery, because he was her physician, and for his representations and advice the company is not responsible." Likewise in this case, any reliance of appellant upon representations, statements, and conduct of McGinley affords no basis for impeachment of the settlement and release of the claim of appellant because McGinley was not a representative of appellee and had no authority or right to speak or act for it. As an actor concerning the matters involved in this case, he was attorney for appellant. See, also, Lipscomb v. Houston Electric Co. (Tex. Civ. App.), 149 S. W. 2d 1042; Jordan v. Guerra, 23 Cal. 2d 469, 144 P. 2d 349; Annotation, 48 A. L. R. 1462; 117 A. L. R. 1022.

The appellant failed to impeach the legality and effec-

tiveness of the settlement and discharge of her claim against appellee. The motion of appellee made after the verdict was properly granted.

The judgment of the district court should be, and it is, affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

JANUARY TERM, 1952

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CARL E. FAUGHT ET AL., APPELLEES, V. PLATTE VALLEY PUBLIC POWER & IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLANT.
51 N. W. 2d 253

Filed January 11, 1952. No. 32987.

1. **Appeal and Error.** To obtain a review of errors of law occurring upon the trial of an equity case, a motion for new trial must be filed assigning the same therein.
2. ———. Likewise, such alleged errors must be assigned and discussed in the brief filed in this court on appeal or they will not ordinarily be considered.
3. **Waters.** The right to use water for irrigation purposes may be acquired by contract with a common carrier irrigation corporation, and such contracts are generally governed by the same rules which pertain to other contracts.
4. **Statutes: Contracts.** Existing statutes and laws with reference to which a contract is made enter into and become part thereof, subject to appropriate legislative limitations subsequently enacted under the police power of the state, and such principle embraces alike those which affect its validity, construction, discharge, and enforcement.
5. ———: ———. Thus when a statute prescribes a duty and a contract is made involving performance of that duty, such statute becomes a part of the contract, or where the law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts providing for the public service.
6. **Contracts.** Where from the nature of a contract it is evident

that the parties contracted on the basis of the continued existence of a condition or state of things to which it relates, the cessation of existence of the condition will excuse performance, a condition to such effect being implied in spite of the fact that the promise may have been unqualified.

7. Contracts: Waters. A construction conferring a right in perpetuity will be avoided unless compelled by unequivocal language of the contract, and a contract will not be construed as imposing a perpetual obligation when to do so would be adverse to public interests.

8. Waters. A purchaser of land from one who holds a water right contract thereon with an irrigation company and who takes title thereto by deed containing ordinary covenants of warranty with no reference to the question of water rights and who refuses to accept water from the company is not personally liable for the maintenance fee mentioned in the water right contract between the grantor and the irrigation company, and, for want of privity of estate, an action cannot be maintained against him to recover a personal judgment therefor.

9. ———. An agreement to pay an irrigation corporation maintenance charges as consideration for the right to use irrigation water upon land is not a covenant running with the land in the absence of privity of estate, which can be created only in connection with a grant of the land sought to be charged or an estate therein, or the equivalent thereof, and the grant of a right to use irrigation water belonging to the public to be conveyed to the land by the corporation is not a right in land or the equivalent thereof.

10. ———. An irrigation corporation does not become the owner or proprietor of the water that it conveys as a public commodity. It is only the servant of the public to carry it to the land for which it has been appropriated, and in such respect stands on the same footing as a common carrier.

11. ———. No private estate can be created in property belonging to the public or devoted to a public use, and a consumer of irrigation water who is not a stockholder in the corporation cannot have a water right in the sense that it is a private freehold interest in the real estate of the distributing irrigation corporation because his right is simply a right of service.

12. ———. The exercise or enjoyment of such right of service does not create an easement in the property of the corporation or the consumer but simply is a right of service to be rendered him by a common carrier public utility subject to regulation and control of the state in such manner as may be prescribed by law.

13. ———. A contract with an irrigation corporation for the use of water is executed with reference to the statutes and laws prescribing its authority, which become a part of the contract. The subsequent purchase of such corporation by a public power and irrigation district does not of itself, without appropriate legislative action or consent of the consumer, actual or implied, make the statutes and laws under which it was authorized to organize and operate a part of the original contract made with the irrigation corporation.
14. Contracts. Where a contract requires successive steps to be taken by the respective parties, if, when a step becomes due, one party either in words or by their equivalent in acts, declines to take it or is unable to do so while the other is ready and willing to do his part, the latter may rescind the contract.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Affirmed.*

*Crosby & Crosby,* and *Beatty, Clarke, Murphy & Morgan,* for appellant.

*Smith Brothers,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiffs brought this suit in equity to cancel and rescind a water right deed and contract and quiet title to described farm land owned by them as against the same because of material changed conditions and abrogation of the deed and contract by defendant. Defendant for answer and cross-petition denied generally and specifically plaintiffs' right to relief prayed and sought a personal judgment against plaintiffs for increased annual water service maintenance charges allegedly due and unpaid by them for the years 1948, 1949, and 1950.

After hearing upon the issues the trial court rendered a decree which cancelled and terminated the contract as of December 3, 1949, the time when notice of rescission was operative, quieted the title to plaintiffs' land against the same, free and clear of any liens for maintenance charges accruing after December 3, 1949, upon

condition, however, that plaintiffs pay into court for the benefit of defendant the sum of $521.91, with interest at 7 percent within 60 days from date of the decree, and in event of default thereof the judgment and decree entered upon plaintiffs' petition should be vacated and set aside. Defendant's cross-petition was dismissed without prejudice to a future action for foreclosure of such unpaid liens arising from the contract.

Defendant's motion for new trial was overruled, and it appealed, assigning substantially that the judgment was not sustained by the evidence but contrary thereto, and contrary to law. We conclude that the assignments should not be sustained. Plaintiffs did not cross-appeal.

At the conclusion of the trial, but after argument and submission, defendant asked leave in open court to amend the prayer of its cross-petition, reducing its interest demand from 9 percent to 7 percent, and praying that any judgment awarded for maintenance service charges should be declared a lien upon plaintiffs' property and a foreclosure thereof should be decreed. The request with regard to interest was granted. The other part of the request was denied without prejudice to future action brought for that purpose. In defendant's brief it was argued that the trial court thus erred. In that regard, however, it appears from the record that defendant did not assign such alleged error either in its motion for new trial or in its brief filed in this court. The applicable rule is that to obtain a review of errors of law occurring upon the trial of an equity case, a motion for new trial must be filed assigning the same therein. Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447. Likewise, such alleged errors must be assigned and discussed in the brief filed in this court on appeal, or they will not ordinarily be considered. Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482. In any event, however, the form of the judgment was such that in the light of our conclusions herein, defendant could not have been preju-

diced in any manner by the court's refusal to permit the amendment.

The facts are not in dispute. The record discloses that in March 1935, Hastings College owned the farm lands here involved. On and prior to that time, Dawson County Irrigation Company was a privately organized and operated Nebraska common carrier public service utility corporation, with a water appropriation from the state. On March 2, 1935, the College entered into a written contract with such corporation whereby it sold and conveyed to the College and to its heirs and assigns "the right to use water from the canal of the" corporation, including a pro rata share of its available contractual reservoir waters "during the irrigation season of each year, in an amount not exceeding" a designated rate "to be used upon and for the purpose of irrigating" the described lands here involved. The consideration therefor was $750 paid in cash by the College and payment by it "annually in advance, on or before the first day of March in each and every year, the further sum of one and 50/100 ($1.50) Dollars, per acre of the land above described, as an annual maintenance charge" which payments were made a lien upon the land from the date when they became due, plus, as further consideration, a waiver and release of any and all claims then existing in favor of the College for loss or damage by reason of any leakage, seepage, breakage, or overflow from any of the canals, laterals, sub-laterals, or ditches of the corporation to any land owned or controlled by the College, together with a conveyance of a right-of-way through the land for the canal and the laterals of the corporation as then constructed upon the land.

The contract contains no date of termination except as hereinafter recited, and it was agreed therein that "this contract shall have the force and effect of a covenant running to and with the said land * * * for above described, and the canal * * *." It provided that "The

*water* to be furnished under this agreement is intended to form a part of the appurtenances to the said land above described, and the right thereto shall be transferable only with and run with said land" and that the corporation should be "bound by this instrument to all present and subsequent owners of said land, but to no other person." (Italics supplied.)

The agreement was made upon the express condition that if the College, its heirs, or assigns, at any time failed, neglected, or refused to make any of the annual maintenance charge payments at the time the same became due and payable, the corporation should have the election, without notice, to furnish the supply of water and sue for the annual payment in law or equity at its election or upon such default to shut off such supply and cease to furnish water under its provisions until payment was made of all such defaulted payments to the corporation with interest thereon at 9 percent from date of default until date of payment, and that upon full payment of such defaulted payments with interest, the College should be reinvested with all rights and privileges theretofore conferred, provided, however, that if any annual payment to be made should remain unpaid and in default for a period of three years, the corporation at its option and upon 60 days' notice in writing to the College, could declare the contract and deed forfeited for failure to pay such maintenance charge, whereupon the deed and contract should terminate and the rights granted therein should revert to the corporation. The contract was appropriately recorded.

The land involved is located four and one-half miles from the main canal on the end of a lateral serving several other consumers.

In 1941 defendant, a public power and irrigation district organized under the provisions of sections 70-601 to 70-671, R. R. S. 1943, purchased all the property and assets and expressly assumed and succeeded to all the

rights, liabilities, and obligations of the Dawson County Irrigation Company, a corporation.

In February 1947, plaintiffs purchased the farm land here involved, and received an ordinary warranty deed to the same, which did not refer in any manner to the water right here involved. They took possession and used no irrigation water in 1947 but paid defendant the annual maintenance charge of $1.50 an acre for that year as specifically provided in the water right deed and contract. In that connection, the fact is that the land was planted to alfalfa, and since it was underlaid with a body of underground water at a depth of about 10 feet at the highest point, no irrigation water was necessary, and they used none during 1947, 1948, 1949, or 1950, although the district was ready and willing during 1948, 1949, and 1950, upon sufficient notice, to deliver such water to them upon request if they would pay an increased maintenance rate hereinafter discussed, which plaintiffs refused to do.

On December 5, 1947, the district, without reference to any regulatory authority except by resolution of its own board of directors and without permission or consent of plaintiffs, as allegedly authorized by section 70-655, R. R. S. 1943, increased the annual maintenance charge for irrigation water service to its users from the contract rate of $1.50 an acre to $2.25 an acre, thus increasing the annual maintenance charge to plaintiffs, who used no water and needed no water, past or future, from $150 a year to $225 a year. It appears from the record that the increased maintenance charge was put into effect by defendant not only to cover increased maintenance costs but also for the purpose of amortizing its original purchase price of the Dawson County Irrigation Company canal and works, the repayment of sums borrowed to meet deficits previously incurred in the operation thereof, and for financing capital improvements and replacements.

Plaintiffs refused to recognize the district's authority

to so increase the rate, refused to enter into a new agreement providing therefor as proposed by defendant, and so advised the district. However, plaintiffs offered at all times to perform the contract as originally executed, and tendered full payment of the maintenance charges at the regular original contract rate with interest, which defendant refused to accept because it was allegedly insufficient to discharge their duty under the increased maintenance rate. Thereafter, on December 3, 1949, plaintiffs filed this action, wherein decree was rendered on December 11, 1950.

In the district court, and again in this court, plaintiffs contended that, because of materially changed conditions and abrogation of the contract by defendant, together with its refusal to perform the same in the light of the provisions of statutes applicable thereto and a part thereof as originally executed, they were entitled, upon reasonable notice, to rescind the contract and have the same cancelled and the title to their land quieted against the same. Such alleged material conditions were their lack of use or need for irrigation water past or future, and defendant's attempt under the provisions of statutes authorizing it to organize and operate, which were never a part of the contract as originally executed, to force plaintiffs to pay alleged increased maintenance rates for amortization of the original purchase price of the Dawson County Irrigation Company canal and works, for repayment of sums borrowed to meet deficits previously incurred in the operation thereof, and for financing capital improvements and replacements. We sustain plaintiffs' contentions.

On the other hand, defendant contended and here contends that the contract contained covenants running with the land imposing an easement on plaintiffs' land and defendant's canal; that the contract as originally executed was made with reference to the subject and existing law under which defendant district was organized and authorized to operate, thus giving it the

right to increase maintenance rates in the manner and for the purpose for which it was done; and that the contract, having no termination date, was perpetual without right of cancellation by plaintiffs or defendant. We conclude that the contention has no merit.

Fundamental rules of law governing the construction and application of such contracts should first be discussed.

In 3 Farnham, Waters and Water Rights, § 614, p. 1935, it is said: "A relation between a consumer and a carrier may be established in either one of three different ways, or by a combination of two or more of them: (1) It may depend upon the consumer taking advantage of the statutory duty of the carrier to supply water at fixed rates; (2) it may depend upon the consumer's relation to the carrier as one of its stockholders; or (3) it may be formed by a simple contract between the carrier and consumer. The rights and duties of the parties under these several modes of establishing relations may differ, and the rights claimed under either may, as has already been suggested, be modified by the existence of one of the other factors. So far as the right depends upon a simple contract relation it is similar to any other contract for a water supply, * * *." As stated in 30 Am. Jur., Irrigation, § 40, p. 624: "The right to use water for irrigation purposes may be acquired by contract. Such agreements, generally speaking, are governed by the same rules that pertain to other contracts * * *." See, also, 56 Am. Jur., Waters, § 256, p. 712; 67 C. J., Waters, § 1076, p. 1404, § 1077, p. 1406, § 1078, p. 1407.

In Watkins & Co. v. Kobiela, 84 Neb. 422, 121 N. W. 448, this court held: "Statutes, with reference to which contracts are made, enter into and become part of the contract. Sessions v. Irwin, 8 Neb. 5." See, also, 3 Williston on Contracts, Revised Edition, § 615, p. 1767.

In Vonburg v. Farmers Irrigation District, 132 Neb. 12, 270 N. W. 835, it was held: "The law in existence at the time a contract is made measures its legality,

subject to any limitations subsequently made under the police power of the state."

In McWilliams v. Griffin, 132 Neb. 753, 273 N. W. 209, 110 A. L. R. 1039, it is said: "This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

As stated in 17 C. J. S., Contracts, § 330, p. 784: "So, when a statute prescribes a duty and a contract is made involving performance of that duty, such statute becomes a part of the contract; or, where the law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts providing for the public service."

As stated in 17 C. J. S., Contracts, § 464, p. 956: "Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing, condition or state of things, to which it relates, the subsequent perishing of the person or thing, or cessation of existence of the condition, will excuse the performance, a condition to such effect being implied, in spite of the fact that the promise may have been unqualified."

As stated in 17 C. J. S., Contracts, § 398, p. 887: "However, a construction conferring a right in perpetuity will be avoided unless compelled by the unequivocal language of the contract, and a contract will not be construed as imposing a perpetual obligation when to do so would be adverse to public interests."

It is contrary to public policy in this state to continue to furnish irrigation water to lands when no further beneficial use can be made of such waters thereon. Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286; State v. Birdwood Irrigation District, 154 Neb. 52, 46 N. W. 2d 884.

It will be noted that neither plaintiffs nor their predecessors were ever stockholders in or owned any interest in property of the Dawson County Irrigation Company, a public service utility corporation, which never owned

or conveyed any land or the equivalent thereof to plaintiffs, but, having organized and obtained an appropriation of irrigation water belonging to the public, was contractually engaged as a common carrier by means of its canals and ditches in rendering a service for compensation and its own profit, by conveying that public commodity to lands for which it had been appropriated.

In the contract here involved, the corporation did not agree to do or refrain from doing anything on its own lands or property except to maintain and keep in good repair its own canals and laterals, a duty otherwise at all times imposed by section 46-274, R. S. 1943. The corporation by this contract conveyed nothing, but simply agreed, for a consideration, to deliver irrigation water during the irrigation season of each year to the boundary of plaintiffs' land into a sub-lateral ditch or canal, to be made and provided at plaintiffs' expense. Otherwise it did not agree to do or refrain from doing anything on plaintiffs' land. In that connection, plaintiffs' grantor conveyed to the corporation a right-of way through its land for the canal and laterals of the corporation, as then constructed thereon, and released any and all claims then existing for loss or damage by reason of any leakage, seepage, breakage, or overflow from any canal, lateral, sub-lateral, or ditches of the corporation to any land owned or controlled by the College.

At the time of the execution of the contract, it was made with reference, among others, to the following applicable and controlling statutes then existing, which became a part thereof.

Section 46-268, R. S. 1943, provided in part: "Whenever any person owning any irrigation ditch or canal, shall convey by deed or contract the right to use the water from such ditch or canal for any tract of land for irrigation purposes, such deed or contract shall be recorded in the county where such land is situated, in the same manner and under the same conditions as

deeds for real estate. Such deed or contract, from the date of the recording thereof, shall be binding upon the *grantor, his, their or its successors or assigns, and all persons claiming any interest in such ditch or canal.*" (Italics supplied.)

Section 46-270, R. S. 1943, provided: "Any corporation or association organized under the law of this state for the purpose of constructing and operating canals, reservoirs, and other works for irrigation and water power purposes, shall have power to borrow money, to issue bonds, and to mortgage its property and franchises in the same manner as railroad corporations; * * *."

Section 46-271, R. S. 1943, provided in part: "Any corporation or association organized under the laws of this state for the purpose of constructing or operating canals, reservoirs or other works for irrigation purposes may, through its board of directors or trustees, assess the shares, stock or interest of the stockholders thereof for the purpose of obtaining funds to defray the necessary running expenses."

Section 46-274, R. S. 1943, provided: "Every person managing, owning or controlling any irrigation works for the storage, carriage or diversion of water, except irrigation districts, shall keep its headgates, diversion dams, canals, and laterals in reasonable and proper repair for the delivery and diversion of water to the appropriators under its canal, and the regulation thereof shall be under the control and direction of the State Railway Commission."

Section 46-275, R. S. 1943, provided: "Irrigation works constructed under the laws of this state are hereby declared to be common carriers. The owner or operator of any works for the storage, carriage or diversion of water, except irrigation districts, shall deliver all water legally appropriated to the parties entitled thereto at a reasonable rate, to be fixed by the State Railway Commission."

It will be noted that by virtue of section 46-268, R.

S. 1943, the right to use the water during the irrigation season of each year was binding on the grantor, its successors, or assigns and all persons claiming any interest in such ditch or canal. However, neither plaintiffs nor their predecessors claimed any interest in the ditch or canal as such. The water to be furnished, which the corporation did not own, was simply contractually appurtenant to their land.

In that connection, it was held in Farmers & Merchants Irrigation Co. v. Hill, 90 Neb. 847, 134 N. W. 929, 39 L. R. A. N. S. 798, Ann. Cas. 1913B 524, that: "A purchaser of land from one who holds a water-right contract thereon with an irrigation company, and who takes title thereto by a deed containing the ordinary covenants of warranty, with no reference to the question of water rights, and who refuses to accept water from the company, is not personally liable for the maintenance fee mentioned in the water-right contract between his grantor and the irrigation company, and an action cannot be maintained against him to recover a personal judgment therefor."

In the opinion it was said: "From the statutes and decisions referred to it would seem that the waters in the running streams of the state are public property, subject to be diverted and applied for beneficial uses. That ditches may be constructed to carry the water to agricultural lands for a reasonable compensation would seem proper, and the owner of the land may undoubtedly obligate himself to assist in the construction and maintenance of the ditch. If the owner of the land after incurring an obligation of this kind sells and conveys it, is there any obligation upon the part of his grantee to keep up a maintenance fee, although he has not undertaken to do so by any personal promise?

"We think that the following authorities tend to show that the defendant is not personally liable, and some of these decisions perhaps tend to show that he is not liable as grantee for any burden unless he and the

plaintiff in the case are privies in estate: 17 Viner, Abridgment of Law and Equity (Privity), p. 534; 2 Bouvier, Law Dictionary; Hurd v. Curtis, 19 Pick. (Mass.) 459; Educational Society v. Varney, 54 N. H. 376; 2 Washburn, Real Property (6th ed.) secs. 1203-1205; Cole v. Hughes, 54 N. Y. 444; Scott v. McMillan, 76 N. Y. 141; Nesbit v. Nesbit, 1 Taylor (N. Car.) 403 (318); Webb v. Russell, 3 T. R. (Eng.) 393; Keppell v. Bailey, 2 Myl. & K. (Eng.) 517; 4 Kent, Commentaries, *473; Mygatt v. Coe, 124 N. Y. 212; Pool v. Morris, 29 Ga. 374; Patton v. Pitts, 80 Ala. 373; Kettle River R. Co. v. Eastern R. Co., 41 Minn. 461; Bloch v. Isham, 28 Ind. 37; Weld v. Nichols, 17 Pick. (Mass.) 538; Bally v. Wells, 3 Wils. (Eng.) 25." However, plaintiffs did not cross-appeal and the personal judgment against them will not be disturbed.

Lingle Water Users' Assn. v. Occidental Building & Loan Assn., 43 Wyo. 41, 297 P. 385, cited and discussed the foregoing Nebraska case with approval for its conclusion that an agreement to pay maintenance charges as a consideration for the right to use irrigation water was, under circumstances comparable with those at bar, not a covenant running with the land for want of privity of estate, which can be created only in connection with a grant of the land sought to be charged or an estate therein or the equivalent thereof, and that a right to the use of irrigation water to be delivered by such a utility was not a right in land or the equivalent thereof. See, also, Cabell v. Federal Land Bank of Spokane, 173 Or. 11, 144 P. 2d 297, which cited such Nebraska case in support of a like conclusion.

In that connection, this court said in Farmers Canal Co. v. Frank, *supra*: "The doctrine of private ownership of water for irrigation purposes, disassociated from the land to which it is designed to be applied, has been proved by long experience to be detrimental to the public welfare. * * * The other doctrine is that the right to the use of water should never be separated from the

land to which it is to be applied. 'Where this doctrine prevails, canals and ditches become like railroads, great semi-public utilities, means of conveyance of a public commodity, their owners entitled to adequate compensation for services rendered, but having no ownership in the property distributed.' * * * The irrigation company does not own the water; it is only the servant of the public to carry it to the land for which it has been appropriated, * * *." See, also, 2 Wiel, Water Rights in the Western States (3d ed.), p. 1241; Farmers & Merchants Irrigation Co. v. Brumbaugh, 81 Neb. 641, 116 N. W. 512.

As stated in Sammons v. Kearney Power & Irrigation Co., 77 Neb. 580, 110 N. W. 308, 8 L. R. A. N. S. 404: "In this respect it stands on the same footing as a railroad company."

In Enterprise Irrigation District v. Tri-State Land Co., 92 Neb. 121, 138 N. W. 171, it is said: "This court has repeatedly said that a canal company is to a certain extent a public service corporation; that it does not own the water that it carries, but acquires by appropriation the right to divert the same and to charge a reasonable fee for the carriage of the same to the lands upon which it was designed to be used. Paxton & Hershey I. C. & L. Co. v. Farmers & Merchants I. & L. Co., 45 Neb. 884; Castle Rock I. C. & W. P. Co. v. Jurisch, 67 Neb. 377; McCook Irrigation & W. P. Co. v. Crews, 70 Neb. 115."

In 3 Farnham, Waters and Water Rights, § 613, p. 1935, it is said: "In Wheeler v. Northern Colorado Irrig. Co. (10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487) it is said that the courts should jealously guard the rights of the carrier, and so deal with it, the Constitution and statutes permitting, as to encourage the investment of capital in the construction of reservoirs and canals for the storage and transportation of water. But the court further said that the question of the rights of water companies in connection with the water diverted will be governed by the user's rights, and not by those of the

water company, for a carrier does not become the proprietor of the water diverted, but merely has a right to compensation for his services in carrying it to the point where it is needed." The same rule was followed in Wyatt v. Larimer & Weld Irrigation Co., 18 Colo. 298, 33 P. 144, 36 Am. S. R. 280, reversing 1 Colo. App. 480, 29 P. 906.

In Miller v. Railroad Commission, 9 Cal. (2d) 190, 70 P. 2d 164, 112 A. L. R. 221, it is said: " 'No private estate can be created in property devoted to a public use, and a consumer of water cannot have a water right in the sense of a freehold interest in the real estate of the distributing company; that his right is simply a right of service.' (Glenn-Colusa Irr. Dist. v. Paulson, 75 Cal. App. 57, 69 [242 Pac. 494]. See, also, Leavitt v. Lassen Irr. Co., 157 Cal. 82 [106 Pac. 404, 29 L. R. A. (N. S.) 213]; Coulter v. Sausalito Bay Water Co., 122 Cal. App. 480, 497 [10 Pac. (2d) 780]; Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 29 [72 Pac. 395].)"

In Glenn-Colusa Irrigation Dist. v. Paulson, 75 Cal. App. 57, 242 P. 494, it is said: "The supreme court of this state in Leavitt v. Lassen Irrigation Co., 157 Cal. 82 [29 L. R. A. (N. S.) 213, 106 Pac. 404], heretofore referred to, holds, in substance, that no private estate can be created in property devoted to a public use, and a consumer of water cannot have a water right in the sense of a private freehold interest in the real estate of the distributing company; that his right is simply a right of service. This, of course, carries with it the right to that service so long as the public utility controls the instrumentality rendering the service. The exercise and enjoyment of such right of service does not create an easement such as is contemplated by section 552 of the Civil Code, but is a service rendered by a public utility subject to the regulation and control of the state in such manner as may be prescribed by law."

It will be noted that plaintiffs' land was never located in, a part of, or included in a contractual self-

governing irrigation district, organized and operated under the authority of Chapter 46, article 1, R. S. 1943, and that plaintiff's right to abandon and have cancelled the right to the use of irrigation water services would not be controlled by those provisions.

Further, the contract here involved was not made with reference to provisions of the statute then existing which permitted the organization and prescribed the authority of a public power and irrigation district such as defendant. The police power of the state neither then nor subsequently made such statutes operative as a part of a contract such as here involved.

In Halligan v. Elander, 147 Neb. 709, 25 N. W. 2d 13, it is said: "However, 'so far as they are applicable' as stated in the opinion, or 'applicable, as nearly as may be,' as stated in section 70-667, R. S. 1943, is always the controlling language which cannot be overlooked to determine the force of the adopted statute in a particular situation.

"It is clearly observable that the circumstances of both the organization and operation of public power and irrigation districts, as well as their uses of water, are entirely different from irrigation districts, * * *." By analogy, the organization and operation of such districts as well as their uses of water are entirely different from irrigation corporations.

We find no provisions in the statutes or other authority, and none in point have been cited, which would permit such a district to purchase an irrigation corporation such as the Dawson County Irrigation Company, and ipso facto make the laws authorizing and prescribing its organization and operation a part of the original contract without plaintiffs' consent, actual or implied, by estoppel or otherwise, which does not appear in this case.

When plaintiffs herein purchased the land, they took whatever rights as were possessed and assumed such obligations as were imposed upon their original predecessors, no more and no less, and stood in their shoes.

Likewise, when defendant purchased the corporation, it stood in the shoes of such corporation. To hold otherwise would permit defendant to legislate and thus make police power operative by mere purchase without proper legislative authority. In that regard, it is sufficient for us to say that plaintiffs' contract did not make them liable as owners or co-owners of defendant's works for an increased maintenance rate with which to amortize defendant's original purchase price of the corporation or to make repayment of sums borrowed to meet deficits previously incurred in the operation thereof or for financing capital improvements and replacements. In that connection, when defendant attempted to force plaintiffs to so perform and it otherwise refused to perform and threatened foreclosure upon plaintiffs' land at the thus increased rate, it abrogated the contract and there were material changed conditions which gave plaintiffs the right to rescind and cancel the contract and quiet the title to their land as against the same.

It is generally the rule that: "* * * where a contract requires successive steps to be taken by the respective parties, if, when a step becomes due, the party either in words or by their equivalent in acts declines to take it, or is unable, while the other is ready and willing to do his part, the latter may rescind the contract." Bishop on Contracts (2d ed.), § 827, p. 341.

On the other hand, in Farmers & Merchants Irrigation Co. v. Hill, *supra,* construing a similar contract, it is said: "The contract sought to be enforced is executory." Upon that premise, we call attention to Hale v. Hess, 30 Neb. 42, 46 N. W. 261, wherein, after quoting from, approving, and relying upon Bishop on Contracts (2d ed.), § 837, p. 347, this court held: "A party to an executory contract has the right to rescind the contract, and terminate it wholly, without the consent of the other party, who is in no fault; the first party becoming liable to the other in any damages he may have sustained, or any compensation he may have earned, by reason of the

rescission." As stated in Bishop on Contracts (2d ed.), § 837, p. 347: "If this were not so, one might be ruined by an undertaking the carrying out of which a change in circumstances rendered highly inexpedient or practically impossible."

As a matter of course, the general rule stated above is subject to the right of specific performance as a partial exception thereto, which defendant has no right to enforce at the increased maintenance rate.

In that connection, a careful analysis of all the authorities cited by defendant does not disclose a single case in which the court said or concluded, under circumstances comparable with those at bar, that a consumer must continue to accept the water services offered and pay for the same at the increased rate. After diligent search, also, we have found none. The authorities hold otherwise.

In Law v. Railroad Commission, 184 Cal. 737, 195 P. 423, 14 A. L. R. 249, wherein the commission had subsequently fixed rates for steam and electricity involved in a comparable contract, the court said: "It follows, of course, in view of the change effected by the order in such an important part of the contract, that petitioner will have the right under the law to rescind the contract, and prevent further use of his property by the former company, except for compensation properly determined." See, also, Annotation 14 A. L. R. 252; McCullough-Dalzell Crucible Co. v. Philadelphia Co., 223 Pa. 336, 72 A. 633.

In Miller v. Railroad Commission, *supra*, it is said: "It is true this water had been dedicated to a public use, but we have been cited to no authority, and we have been unable to discover any through our own efforts, which holds that a water user, having no further use for the waters furnished by a public utility, can be forced either to receive his proportion of those waters or to pay for the same without using it." See, also, 3 Farnham, Waters and Water Rights, § 609, p. 1917; 2 Wiel,

Water Rights in the Western States (3d ed.), § 1328, p. 1234; South Boulder & R. C. Ditch Co. v. Marfell, 15 Colo. 302, 25 P. 504.

In 43 Am. Jur., Public Utilities and Services, § 99, p. 641, it is said: "If a contract for public utility rates in return for a conveyance is modified or abrogated by legislation or a regulatory body, it does not necessarily follow that the grantor is without a remedy. Indeed, the majority of the cases hold that one who has parted with property in return for a rate contract which is subsequently prohibited or modified by public authority may have the contract rescinded or recover damages."

It may be argued that the foregoing reasons, or some of them, for our decision were not those given by the trial court in its decree. Be that as it may, the applicable rule is: "A proper judgment under the pleadings and the evidence will not be reversed on appeal merely because the trial court did not give the right reason for the decision." Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

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EDWARD M. CHAMBERS, APPELLEE, V. HELENE M. CHAMBERS, APPELLANT.
51 N. W. 2d 310

Filed January 11, 1952. No. 33044.

1. **Divorce.** A party may not in an action for divorce challenge the right of a plaintiff to maintain an action after having filed cross-petition therein for divorce and having obtained the relief prayed for.
2. **Husband and Wife.** A postnuptial or separation agreement is valid if it is fair and equitable; if there has been conduct of a party justifying legal separation; if the parties immediately separate; and if the provisions of the agreement are observed by the parties.

3. ———. Postnuptial agreements are without validity during the existence of the complete marriage relation.
4. ———. A postnuptial or separation agreement validly entered into at the time is invalidated by a resumption of the complete marriage relation.
5. **Divorce.** In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.
6. **Appeal and Error.** It is the duty of this court in determining the issues before it on appeal in an equity action to arrive at a conclusion independent of that reached by the district court, subject however to the rule that where the evidence is in irreconcilable conflict on material matters it may consider the fact that the trial court observed the witnesses and their manner of testifying.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

*Neighbors & Danielson,* and *Charles A. Fisher,* for appellant.

*Edwin D. Crites, A. W. Crites, Straight Townsend,* and *Neal D. Youmans, Jr.,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action for divorce by Edward M. Chambers, plaintiff, against Helene M. Chambers, defendant, in the district court for Scotts Bluff County, Nebraska. In

the action the defendant filed a cross-petition for divorce. The district court granted a divorce to the defendant. The defendant has appealed from a part of the decree. The plaintiff has cross-appealed from a part of the decree. The defendant is the appellant and cross-appellee and the plaintiff is appellee and cross-appellant.

Neither party has appealed from that part of the decree which grants to defendant a divorce from the plaintiff. The substance of defendant's appeal is a contention that the allowances by way of support money pendente lite, alimony, and division of property were insufficient. The substance of plaintiff's cross-appeal is that the allowances made were improper and excessive.

It is true that there are assignments of error in appellant's brief dealing with subjects other than the matter of allowances. They may not however be reviewed here. Three of them relate to matters which have been waived, if they constituted error, by affirmative act of the appellant.

After appellee commenced the action in Scotts Bluff County the appellant challenged his right to maintain the action on the ground that there was another such action pending in Dawes County. The challenge was made successively by special appearance, demurrer, and plea in abatement. These were overruled whereupon appellant filed answer and cross-petition. By the cross-petition she prayed for a divorce. She thereby invoked the jurisdiction of the court. Upon this invocation the decree in her favor was granted.

This court has said: "A party cannot predicate error upon a ruling which he procured to be made." Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367.

The fourth assignment challenges refusal of the court to strike parts of the reply and the answer to the cross-petition. The contention here is that these contained allegations not proper since they amounted to alleged

grounds for divorce not contained in the original cause of action.

Whether or not this was error is not important here as is clear from the fact that the court awarded no relief in favor of appellee thereon.

Before proceeding to a consideration of appellant's assignment of error relating to the matter of allowances it appears necessary to dispose of a contention of the appellee with reference to a certain agreement relating to property and rights which had been entered into between the parties.

The parties were married on May 2, 1940. Trouble between them arose and on December 21, 1948, an action for divorce was instituted. During the pendency of that action and on January 25, 1949, the parties entered into a separation agreement. The parties, after declaration that a separation had taken place which would continue, entered into an agreement wherein upon valid considerations their estates became separate and each was relieved from any further obligation to the other flowing from the marriage relation or from the laws of descent and distribution.

Appellee fully performed under the agreement. After this performance the parties became reconciled and resumed the marriage relationship. The appellant however did not return to appellee any of the considerations which she had received under the agreement.

After this reconciliation took place trouble again arose and the present action was instituted. The appellee contends that the agreement previously entered into, since appellant did not return the considerations, is binding and in full force and effect and that appellant is barred from asserting any right to alimony or division of property in excess of or contrary to provisions of the agreement.

The validity of an agreement such as the one entered into between the parties here is recognized if it is fair and equitable; if there has been conduct of a party jus-

tifying legal separation; if the parties immediately separate; and if the provisions of the agreement are observed by the parties. In re Estate of Lauderback, 106 Neb. 461, 184 N. W. 128; Smith v. Johnson, 144 Neb. 769, 14 N. W. 2d 424; Focht v. Wakefield, 145 Neb. 568, 17 N. W. 2d 627.

It is not urged here that the agreement when entered into was not fair and equitable. The parties themselves considered at the time that there were legal grounds for separation. There was a separation and the considerations for the agreement passed. At the time, under the authorities cited, the agreement was valid and binding upon the parties.

It will be observed from an examination of the authorities cited that the validity of such an agreement depends upon the observance of the terms of the agreement. One of those conditions is that the parties shall be separated. This condition was not observed. The parties became reconciled and re-established the relationship wherein this court has declared no valid postnuptial agreement may be entered into.

In Smith v. Johnson, *supra,* it was said: "The foregoing cases are what are commonly called separation agreement cases. They do not recognize the right of husband and wife to enter into a postnuptial agreement barring their respective rights in the other's real property while the complete marriage relation exists."

Such agreements are held invalid because of common law prohibition and on the grounds of public policy. It appears to be a necessary corollary that when a separation agreement is validly entered into but thereafter the parties restore themselves to the complete marriage relation such an agreement becomes invalid and unenforceable.

It is concluded therefore that the agreement in question may not be regarded as determinative of the rights of the parties in this divorce action.

In determining the question of alimony and division

of property resort must be had to the following rule: "In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just." Mangiameli v. Mangiameli, 153 Neb. 753, 45 N. W. 2d 910. See, also, Kroger v. Kroger, 153 Neb. 265, 44 N. W. 2d 475; Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508; Zoppelli v. Zoppelli, 153 Neb. 577, 45 N. W. 2d 599; Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139.

At the time of the marriage appellant was 34 years of age and appellee was 39. Both had been previously married. No children were born of the marriage. The parties lived together, except for a short period of time, from the time of the marriage until the commencement of this action which was November 25, 1949.

At the time of the marriage the appellee was engaged in the wholesale oil and grease business in Chadron, Nebraska. Appellant was operating her own business at the time. The business was the publication and distribution of a mimeographed advertising sheet known as Ad-Visor. There is no authentic evidence of financial productivity of either of these enterprises. Neither appears to have yielded high profits. The parties pur-

chased a considerable amount of furniture and household goods for the most part if not entirely on credit. The value at the time of purchase appears to have been about $2,000. There is no certainty as to how this indebtedness was liquidated but it appears reasonable to say that contribution was made thereto by both parties. Appellant sold the Ad-Visor for $3,750. After the marriage appellant purchased and for a time operated a newspaper known as the Panhandle Digest. This was later sold for $5,500. Also after the marriage appellant acquired an appliance store. It is known as the Budget Store. She still owned and operated it at the time of trial. The results of these three enterprises have not been shown.

After the marriage the appellee abandoned the oil and grease business and entered into the business of wholesaler of automotive parts, appliances, and supplies under the name of Ed Chambers Company. The Sidles Company purchased a 51 percent interest in this company. The company was incorporated and the name was later changed to the Sidles-Chambers Company. At the time of trial there were 920 shares of stock outstanding of which number appellee held 285 and his daughter 110. The shares held by the daughter according to appellee were a gift and we think the evidence reasonably discloses that they were at least under control of appellee.

The record fairly discloses that at the time of trial appellee had the following property and assets: 395 shares of stock in the Sidles-Chambers Company, a Cadillac automobile of the estimated value of $2,020, and life insurance policies amounting to $25,000.

What the stock was worth is problematical. The appellee estimated its value at not to exceed $125 a share. An officer of the company estimated its value at not to exceed $160 a share. The corporation has never paid any dividends to the stockholders although it showed a net profit for 1947 of $48,212.28, for 1948 of $34,979.71, and for 1949 of $14,647.46. How this profit was distributed

or applied is not clearly shown except as to one item. Appellee received ten percent of it as a bonus in addition to his salary. His salary was $600 a month or $7,200 a year.

In the record are exhibits from which testimony has been given as to the financial condition of the corporation but from this no reasonably accurate analysis can be made of that condition.

As liabilities appellee owed a balance of $7,300 to the First National Bank of Chadron. He owed Sidles-Chambers Company $11,671. He also owed the company on overdrafts approximately $650. This total is $19,621.

The amount of property and estate which the appellant had at the time of trial has not been clearly disclosed. She has not chosen to put this important information in the record. It is clear that she had $1,500 cash in a bank, the Budget Store of the probable value of about $8,000, household goods of the value of $2,000, and a Chevrolet automobile which cost $2,300. During the marriage she received $3,750 from the sale of the Ad-Visor and $5,500 from the sale of the Panhandle Digest. She received from appellee $15,000 under the separation agreement, which as has been pointed out herein was invalidated by resumption of the marital relationship, no part of which was ever returned. Under this same agreement she received a $5,000 insurance policy having a cash value of $2,710 which she surrendered later for its value at the time of surrender. She appropriated a savings account and savings bonds of the value of $4,200. Information as to the status of these items totaling $31,160, except in very small part, has not been disclosed.

The evidence indicates that neither party contributed substantially to the business enterprises of the other. They operated their respective businesses separately and independently of each other.

The only subjects of substantial joint contribution were the purchase of household goods and equipment, the purchase of the above-mentioned savings bonds and the ac-

cumulation of savings amounting to $4,200, and the maintenance of the household.

Appellee paid nothing to appellant for her support or the maintenance of the home after July 1949.

In the decree herein the property and business of appellant are not mentioned but it is clear that her right to all of it has not been disturbed.

By the decree she was awarded permanent alimony in the amount of $24,000. On this was credited $15,000 and $2,750, this being the cash value of a life insurance policy at the time it was surrendered. These two items had been received by her under the postnuptial agreement and not returned after reconciliation. Also on this was credited $4,200 for war bonds and postal savings appropriated and never returned. This made a total of $21,950. Thus the balance owing was $2,050. In addition she was allowed attorney's fees in the amount of $2,000 and costs of the action.

It is the duty of this court in determining the matters before it on this appeal to arrive at a conclusion independent of that reached by the district court. Where, however, as in this case, the evidence is in conflict and uncertain the rule that where the evidence is in irreconcilable conflict on a material issue the court may consider the fact that the trial court observed the witnesses and their manner of testifying is peculiarly applicable. Fisher v. Standard Investment Co., 145 Neb. 80, 15 N. W. 2d 355; W. L. Phillips Sons v. Northwest Realty Co., 152 Neb. 808, 43 N. W. 2d 6; Strasser v. Strasser, *supra*.

Bearing this rule in mind and applying the general rule to be applied in the matter of division of property and fixing alimony, which rule was set forth earlier herein, we conclude that the award as fixed by the decree was equitable and just.

The decree of the district court is affirmed.

AFFIRMED.

CHARLES DAHLKE, APPELLEE, V. BERTHA DAHLKE, APPELLANT, MINNIE GUTZMER ET AL., APPELLEES.
51 N. W. 2d 266

Filed January 11, 1952. No. 33066.

1. **Vendor and Purchaser.** In the construction of every instrument for the conveyance of real estate or any interest therein, it is the duty of courts to carry into effect the true intent of the parties so far as such intent can be ascertained from the whole instrument and it is consistent with rules of law.
2. **Estates.** An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that upon the occurrence of a stated event, the conveyor or his successor in interest shall have the power to terminate the estate so created.
3. ———. When a transferor, having an estate in fee simple absolute transfers an estate in fee simple subject to a condition subsequent, the transferee is regarded as having received the entire estate of the transferor, who, by virtue of his reserved power of termination has the power to regain his former estate if and when there is a breach of the condition subsequent.
4. ———. The owner of an estate in fee simple defeasible may be restricted in his uses of the affected land by an outstanding easement or profit or restricting covenant; or his estate may be subject to a money charge in favor of a third person which operates as a lien thereon.
5. **Estates: Covenants.** The language of an instrument frequently requires construction to determine whether it creates a condition subsequent, a covenant, or both. When found to create both, the person entitled to enforce the covenant is entitled to all equitable relief normally available with respect to such a covenant, despite the fact that a condition subsequent also exists.
6. **Equity: Trusts.** Ordinarily, where property is transferred to another subject to the payment of a certain sum to a third person, an equitable charge and not a trust is created. On the other hand, ordinarily where property is transferred to another with direction to pay to a third person a certain sum out of the property or its proceeds, a trust and not an equitable charge is created.
7. ———: ———. In the case of an equitable charge, as in that of a trust, the person having title to property holds it subject to an equitable interest in another person. If an equitable charge is created, the equitable encumbrancer has an equitable lien upon

the property, but the person who holds subject to the charge is the owner of the property, subject only to the lien.

8. Trusts. If, by the terms of a trust, an interest passes to the beneficiary during the life of the settlor, although the interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not ordinarily a testamentary trust, and the disposition is not testamentary and the intended trust is valid even though the interest of the beneficiary is contingent upon the existence of a certain state of facts at the time of the settlor's death.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed.*

*Lee Kelligar*, for appellant.

*Henry F. Schepman* and *John C. Mullen*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, in his own behalf and for the benefit of defendant brothers and sisters, brought this suit in equity to recover $6,000 with interest and have the same declared and enforced as a lien upon described farm lands, under the provisions of a warranty deed executed by the father and mother, conveying the same to plaintiff's sister, defendant Bertha Dahlke. Such defendant answered, denying generally, but admitting execution and delivery of the deed on June 21, 1920, and subsequent recording thereof. She also admitted that thereunder she immediately took possession of the land and continuously thereafter retained possession and paid all taxes levied and assessed against it. She alleged that she was the owner in fee simple, free and clear of all liens and encumbrances, since paragraph Fourth of the deed was null and void, thus unenforceable because it was testamentary in character, and the requirements of the statutes relating to wills were not complied with in its execution and because it sought to impose an obligation upon defendant for the payment of money only,

not for the benefit of grantors, but for a stranger to the contract and deed. Two defendants, a brother and sister of plaintiff, filed separate answers admitting the allegations of plaintiff's petition and joining in the relief prayed by him. All other defendants defaulted.

After a hearing upon the merits, the trial court rendered its decree, finding and adjudging the issues generally for plaintiff and other defendants but against defendant Bertha Dahlke. However, it found and adjudged that such defendant, as a sister of William Dahlke, deceased, for whose benefit the charging lien had been imposed, was the owner of an equal one-seventh share of the lien with interest at 6 percent from February 8, 1950, and gave her credit therefor, of which plaintiff makes no complaint.

The decree specifically provided: "6. That the plaintiff Charles Dahlke and the defendants Minnie Gutzmer, Mary Burow, Amanda Munson, Eddie Dahlke and Ernest I. Dahlke, have and recover from the defendant Bertha Dahlke the sum of $5,142.86 with interest at 6% from February 8, 1950 and in default of the defendant Bertha Dahlke within 60 days from date of decree to pay said amount together with costs that an order of sale issue to the Sheriff of Richardson County, Nebraska directing him as Sheriff to sell said real estate as upon execution to satisfy said sum of $5,142.86 with interest at 6% from February 8, 1950.

"7. Costs of this action taxed against the defendant Bertha Dahlke in addition to said sum of $5,142.86 with interest at 6% from February 8, 1950.

"8. That any money in the hands of the Sheriff of Richardson County, Nebraska from the sale of said real estate after paying said $5,142.86 with interest at 6% from February 8, 1950 and costs taxed to said defendant Bertha Dahlke, to the parties entitled to receive the same shall be paid by the Sheriff of Richardson County, Nebraska, to the defendant Bertha Dahlke."

Defendant Bertha Dahlke's motion for new trial was

overruled, and she appealed, assigning substantially that: (1) The trial court erred in entering a personal judgment against her and in granting a lien with foreclosure thereof; and (2) that the decree was contrary to law. We conclude that the assignments should not be sustained.

At the outset it will be noted that the warranty deed specifically provided, among other things, that the charge of $6,000 "upon said premises * * * shall be and is a lien thereon" and that it "shall be paid * * * by said grantee within one year after the death of the last surviving grantor" and "that for the failure of the said grantee herein, in the performance * * * at the time and in the manner provided herein, then" the persons having the "right as provided herein shall proceed at law to enforce the lien herein and recover the charges made in his or their behalf * * *." In the light thereof, it is apparent that unless paragraph Fourth of the deed was null and void, as argued by defendant, the trial court's decree was correct in every respect.

There remains then only the question of whether or not the decree was contrary to law. We conclude that it was not.

The pertinent facts are as follows: August Dahlke and Mena Dahlke, his wife, parents of defendant Bertha Dahlke, were on June 21, 1920, owners of the described land involved. On that date, as grantors, they executed and delivered to said defendant as grantee, a warranty deed to the land. Admittedly she accepted the deed, duly recorded it, and was in possession of the land from that date until the trial, a period of more than 30 years.

Insofar as important here, the deed recited as consideration "the sum of One Dollar, in hand paid, and the consideration of love and affection, together with conditional considerations hereinafter set forth, * * *." Such considerations were, first, that grantee should pay all taxes and assessments upon the property before the same became by law delinquent. That has been com-

plied with. Second, that grantee should not, during the lifetime of grantors or the survivor of them, sell, convey, mortgage, or in any manner encumber the premises. Compliance therewith is not disputed here. Third, the grantors reserved to themselves and the survivor of them for life an annual charge of $400 against and upon the premises, which should be paid by grantee to them or the survivor, on or before December 31st of each and every year, including 1920, during the life of grantors and the survivor of them. Also, compliance therewith is not disputed here.

The fourth is the provision herein directly involved. It provided: "The said grantors hereby place a further charge upon said premises in the sum of six thousand dollars ($6000.00), which shall be and is a lien thereon, subject only, to taxes and the annual charge hereinbefore reserved, and which said charge of $6,000.00 is made in favor of and shall be paid to our son William Dahlke by said grantee within one year after the death of the last surviving grantor herein, provided the said William Dahlke be then living, and if dead then said payment shall be made to his surviving issue, if there be a failure of living issue of his body, then in equal parts to his brothers and sisters, the children of any deceased brother or sister to receive the share of their ancestor: Provided, that for the failure of the grantee herein, in the performance of conditions number one and two hereof, such failure is declared to and shall work a forfeiture of this conveyance, and the said grantors shall declare said forfeiture and re-enter the said premises and this conveyance shall be and become null, void and of no effect: Provided further, that for the failure of the said grantee herein, in the performance of condition number four hereof at the time and in the manner provided herein, then the said William Dahlke or the next in right as provided herein shall proceed at law to enforce the lien herein and recover the

charges made in his or their behalf according to the provisions of said condition number four."

Grantor Mena Dahlke, wife of grantor August Dahlke, died March 21, 1939. August Dahlke died February 8, 1949. They were the mother and father of plaintiff Charles Dahlke, the defendants Minnie Gutzmer, Mary Burow, Amanda Munson, Eddie Dahlke, Ernest I. Dahlke, and grantee, defendant Bertha Dahlke, all of whom survived and were the only brothers and sisters of William Dahlke, also a son of Mena and August Dahlke, who, when 66 years of age, died without issue on December 6, 1948. Other defendants were the respective spouses of defendant brothers and sisters.

Bertha Dahlke has never paid the $6,000 to William Dahlke or any other person, and no other proceedings at law or in equity have been brought to collect the same.

The question of whether or not the fourth provision was null and void as testamentary in character is dependent upon grantor's intent to be gathered from the language of the instrument and applicable rules of law. As held in Carr v. Miller, 105 Neb. 623, 181 N. W. 557: "In the construction of every instrument for the conveyance of real estate or any interest therein, it is the duty of the courts to carry into effect the true intent of the parties, so far as such intent can be ascertained from the whole instrument and is consistent with the rules of law. Rev. St. 1913, sec. 6195; Benedict v. Minton, 83 Neb. 782."

As stated in Blochowitz v. Blochowitz, 130 Neb. 789, 266 N. W. 644: "However, in this state, the statute requires: 'In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with

the rules of law.' Comp. St. 1929, sec. 76-109. This statute is applicable alike to wills, deeds, and contracts to convey. Heiser v. Brehm, 117 Neb. 472, 221 N. W. 97; Reuter v. Reuter, 116 Neb. 428, 218 N. W. 86."

In Ohm v. Clear Creek Drainage District, 153 Neb. 428, 45 N. W. 2d 117, this court held: "An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate so created." As stated in the opinion: "Restatement, Property, § 45, p. 133, comment a, says: '* * * When a transferor, having an estate in fee simple absolute transfers an estate in fee simple subject to a condition subsequent, the transferee is regarded as having received the entire estate of the transferor, who, by virtue of his reserved power of termination has the power to regain his former estate, if and when there is a breach of the condition subsequent.' " Defendant took such a title when she accepted the deed and assumed its obligations.

Also, as stated in Restatement, Property, chapter 4, p. 168: "The owner of an estate in fee simple defeasible may be restricted in his uses of the affected land by an outstanding easement or profit or restricting covenant; or his estate may be subject to a money charge which operates as a lien thereon, * * *." Also, as stated in Restatement, Property, 1948 Supplement, § 24, comment ff, p. 361: "The language of an instrument frequently requires construction to determine whether it creates a condition subsequent, a covenant or both (see § 45, Comments n, o and p). When found to create both, the person entitled to enforce the covenant is entitled to all equitable relief normally available with respect to such a covenant, despite the fact that a condition subsequent also exists."

In Restatement, Trusts, § 10, comment f, p. 34, it is

said: "Whether an equitable charge or a trust is created depends upon the manifestation of intention of the transferor. If the transferor manifests an intention to impose a duty upon the transferee to deal with the property for the benefit of a third person and to give to the third person the beneficial interest therein, a trust is created; if he manifests an intention not to impose such a duty upon the transferee, but to give to the transferee the beneficial interest therein, and to give a security interest to the third person, an equitable charge is created.

"Ordinarily where property is transferred to another 'subject to the payment of' a certain sum to a third person, * * * an equitable charge and not a trust is created, since the transferor does not thereby manifest an intention to impose a duty upon the transferee to deal with the property for the benefit of the third person. On the other hand, where property is transferred to another with a direction to pay to a third person a certain sum out of the property or its proceeds, * * * a trust and not an equitable charge is created, since the transferor thereby manifests an intention to impose a duty upon the transferee to deal with the property in part at least for the benefit of the third person." Also, as stated in the same section, comment a, p. 32: "In the case of an equitable charge, as in that of a trust, the person having title to property holds it subject to an equitable interest in another person. If an equitable charge is created, the equitable encumbrancer has an equitable lien upon the property, but the person who holds subject to the charge is the owner of the property, subject only to the lien; a trustee is not the owner of the trust property although he has title to it (see § 2, Comment d). An equitable interest as well as a legal interest may be subject to an equitable charge, just as an equitable interest as well as a legal interest may be held in trust.

"After the equitable charge is paid, the devisee can hold the property free and clear. On the other hand,

where property is transferred upon a trust which is fully performed, without exhausting the trust estate, the trustee holds the surplus upon a resulting trust for the settlor unless the settlor properly manifested a different intention (see § 430)."

Further, as stated in Restatement, Trusts, § 56, comment f, p. 172: "If by the terms of the trust an interest passes to the beneficiary during the life of the settlor, although the interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not a testamentary trust, except as stated in § 57 (2, 3). The disposition is not testamentary and the intended trust is valid, even though the interest of the beneficiary is contingent upon the existence of a certain state of facts at the time of the settlor's death." Section 57 (2, 3) has no application here.

It will be observed then that whether the $6,000 involved was an equitable charge as argued by plaintiff, or a trust as argued by defendant Bertha Dahlke, it conveyed a present contingent equitable interest to the beneficiary and it would be valid and binding upon defendant, Bertha Dahlke, and not null and void as testamentary in character. We find no provision in the deed which could make paragraph Fourth null and void. Cases cited and relied upon by defendant are distinguishable upon both the facts and the law, and are not in point or controlling here.

As a matter of fact, the obligation as specifically imposed by the instrument itself formed a part of the consideration for the conveyance which grantee accepted, thereby assuming its payment as a part of the consideration therefor. Peterson v. Graves, 134 Kan. 805, 8 P. 2d 308, involved the construction and enforcement of a comparable provision in a deed, wherein the beneficiary was a third person and not a party to the instrument. In that opinion, it is said: "The deed recited a consideration of one dollar and 'other consideration.' Calling a provision in a deed a condition does not make the pro-

vision a condition. In this instance, the provision constituted in effect a covenant to pay Mabel and Edith, which formed the consideration for the conveyance to defendant. The deed became effective the moment defendant accepted it. From that moment he became bound to satisfy the condition, and his breach of the condition created a cause of action in plaintiff's favor." See, also, 14 Am. Jur., Covenants, Conditions and Restrictions, § 4, p. 483, § 196, p. 611.

Wier v. Simmons, 55 Wis. 637, 13 N. W. 873, also involved construction and enforcement of comparable provisions in a deed, wherein the beneficiaries were third persons not parties to the instrument. In that opinion it is said: "Whether a provision in a deed or will, which, as a part of the consideration, requires the payment of money to third persons by the grantee or devisee therein, within a fixed time after the title and right of possession vest in him, will be construed to be a charge upon the land, or whether it will be construed to be a condition subsequent, depends upon the intent of the parties to the conveyance, or of the testator in the case of a devise, and it will always be construed to make a charge upon the premises, unless a different intent is clearly apparent, or in the case of a deed the language is so clear as to leave no room for construction or doubt." The conclusion of the court, citing numerous authorities in support thereof, was: "That they are a lien and charge upon the lands which can be enforced in equity, we think is well settled, both upon principle and authority."

In Krahn v. Goodrich, 164 Wis. 600, 160 N. W. 1072, it is said: "The decision below that the conveyance of land by one person to another by deed, on condition of such other paying to a third person a specified sum of money, and acceptance of such conveyance, creates a lien upon the land in favor of such third person, is correct,—Wier v. Simmons, 55 Wis. 637, 13 N. W. 873; Williams v. Williams, 82 Wis. 393, 52 N. W. 429; Mer-

ton v. O'Brien, 117 Wis. 437, 94 N. W. 340; Powers v. Powers, 28 Wis. 659; Korn v. Friz, 128 Wis. 428, 107 N. W. 659; but where the payment is made contingent upon a condition precedent, the lien is likewise contingent and, if the time limited for such precedent event to occur expires without its happening, the possibility of the lien ripening into an absolute interest no longer exists. That was what happened in this case." In the case at bar, however, the time has expired, the events have occurred, and since all other conditions have been performed by defendant, the lien has ripened into an indefeasible absolute enforceable interest.

Also, in Logan v. Glass, 136 Pa. Sup. 221, 7 A. 2d 116, affirmed 338 Pa. 489, 14 A. 2d 306, wherein it was concluded that the deed was not testamentary in character and that both the promisor personally and the land were bound, it is said: "It is well established in this Commonwealth that the words 'subject to the payment' of money conditioning a devise of real estate ordinarily has the effect of creating a charge upon the land acquired thereby. That the same principle applies where the land is acquired by deed or grant is not disputed. * * * Just as the acceptance of the devisee implies a promise to perform the condition on which the beneficiary may base his actions, so the acceptance of the grantee imposes upon him a contractual obligation for the benefit of another, whose legal position is that of a third party beneficiary to the contract of conveyance. And 'where performance of a promise in a contract will benefit a person other than the promisee that person is . . . . a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary.' * * * The view. suggested in the

Restatement and prevailing in this country, that a donee beneficiary has an unqualified right of action to enforce the duty of the promisor to perform the promise, is now, and has been for some years, recognized by the appellate courts of this Commonwealth. This right of action in a third person has long been recognized where money or property has been given over for his sole benefit. * * * 'According to this view the donee beneficiary acquires a right at once upon the making of the contract and that right becomes immediately indefeasible.' " See, also, Stewart v. Colvin, 202 Okl. 380, 214 P. 2d 229.

In the light of the foregoing, the deed here involved became effective and its provisions were enforceable when the deed was accepted by defendant, Bertha Dahlke. She thus became bound to carry out its provisions as intended by the grantors, all of which provisions were consistent with rules of law.

For the reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

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ALBERT D. BECKER, APPELLEE, V. COUNTY OF PLATTE, NEBRASKA, APPELLANT.
No. 33070.
MARGARET LIPS, APPELLEE, V. COUNTY OF PLATTE, NEBRASKA, APPELLANT.
No. 33071.
DELORES BENNING, APPELLEE, V. COUNTY OF PLATTE, NEBRASKA, APPELLANT.
No. 33072.
50 N. W. 2d 814

Filed January 11, 1952.

**Statutes: Counties.** Section 23-916, R. S. 1943, does not relate to the condition of the budget at the time a claim is filed or

acted on by the board but to the time the contract is entered into or liability incurred for any of the purposes for which provision is made in the budget.

APPEAL from the district court for Platte County: ROBERT D. FLORY, JUDGE. *Affirmed.*

*Byron Reed,* and *Beynon, Greenamyre & Hecht,* for appellants.

*Walker, Luckey & Hunter,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Platte County. It involves three claims filed against Platte County for services rendered in the office of the county assessor. The three claimants, their claims having been disallowed, appealed to the district court for Platte County. There the three claims were consolidated for trial, jury being waived. The trial court found for each of the claimants and entered judgment against the county accordingly. Its motion for new trial in each case having been overruled, the county appealed.

The cases on appeal were consolidated for the purpose of briefing and oral presentation. Since they involve the same or comparable situations we will consolidate them for the purpose of this opinion.

It is either admitted or established by the evidence that the budget of Platte County, for the fiscal year July 1, 1949, to June 30, 1950, fixed the amount available for the county assessor in the sum of $11,475; that claimants Margaret Lips and Delores Benning were appointed full-time assistants and claimant Albert D. Becker was appointed a special assistant to the county assessor, J. R. Brunken, and their salaries fixed, all in accordance with the provisions of section 77-401.01, R. S. Supp., 1949; that during the period from March 10 to April 21, 1950, inclusive, claimant Becker worked 37 days for which

he filed a claim for $296; that claimants Lips and Benning worked regularly during the fiscal year July 1, 1949, to June 30, 1950, and were paid for the first eleven months thereof and filed their claims for June 1950; that the work performed by these claimants was services necessary to enable the assessor to properly perform the duties of his office; that the claim of Margaret Lips for June 1950 was in the sum of $110 and of Delores Benning for the month of June 1950 was in the sum of $100; that all three claims were filed with the county clerk of Platte County on June 10, 1950; and that the board of supervisors of Platte County disallowed these three claims on June 15, 1950, for the reason that the amount allowed in the county budget for the office of county assessor was then exhausted.

It is appellant's thought that since the amount appropriated in the budget to the office of county assessor had been exhausted when these claims came up for consideration that under the provisions of the County Budget Act of 1937, being Chapter 23, article 9, R. S. 1943, as amended, particularly sections 23-916 and 23-917 thereof, that the county was not liable and therefore the board of supervisors properly disallowed the claims. We shall hereinafter refer to the County Budget Act of 1937, as amended, as the Act.

Section 23-917, R. S. 1943, of the Act, insofar as here material, provides: "After the adoption of the county budget, no county shall be liable, * * * on any contract, * * * for any services rendered such county in pursuance of any contract entered into by or on behalf of such county in violation of the provisions of section 23-916."

It will be noted that section 23-917, R. S. 1943, is applicable when the contract is in violation of the provisions of section 23-916, R. S. 1943.

Section 23-916, R. S. 1943, insofar as here material, provides: "After the adoption of the county budget, no officer, department or other expending agency shall ex-

pend or contract to be expended any money, or incur any liability, or enter into any contract which, by its terms, * * * involves the expenditure of any money for any of the purposes for which provision is made in the budget in excess of the amounts provided in said budget for such office, department or other expending agency, or purpose, for such fiscal year. Any contract, verbal or written, made in violation of this section shall be null and void as to the county, and no moneys belonging thereto shall be paid thereon."

Section 23-916, R. S. 1943, does not relate to the condition of the budget at the time a claim is filed or acted on by the board but to the time the contract is entered into or liability incurred for any of the purposes for which provision is made in the budget. That valid claims may be presented, the allowance of which will result in deficits, is contemplated by the Act for section 23-903, R. S. Supp., 1949, provides in part: "The budget of the county shall present a complete financial plan for the period for which said budget is drawn, as hereinafter provided. It shall set forth (1) all proposed expenditures for the administration, operation and maintenance of all offices, departments, activities, funds and institutions of the county, (2) the actual or estimated operating deficits from prior years, * * *."

If such a deficit results because there have been filed, allowed, and paid claims for which the county was not liable under the Act the county is protected by section 23-919, R. S. 1943, which provides in part as follows: "Any member of the county board or any other official whose duty it is to allow claims and issue warrants therefor, or to make purchases, incur indebtedness, enter into contracts for or on behalf of the county, who issues warrants or evidences of indebtedness, or makes any purchase, incurs any indebtedness or enters into any contract for or on behalf of the county contrary to the provisions of said sections, shall be liable to the county for such violations in the full amount of such

expenditures, and for the full amount which the county may be required to pay by reason of any purchase made, indebtedness incurred or contract made contrary to the provisions of said sections, whether the liability of the county to pay for such supplies, materials, merchandise, equipment or services is based upon said contract or upon quasi-contract, or upon an obligation arising by operation of law, and recovery may be had against the bondsman of such official for said amounts."

At the time claimants Lips and Benning were appointed regular full-time assistants by the assessor and their appointments were consented to and their salaries fixed by the board of supervisors the balance available in the budget of the county assessor was sufficient to cover their salaries for the fiscal year from July 1, 1949, to June 30, 1950, which included June of 1950 for which claim is here made. The same appears to be true on March 6, 1950, when claimant Becker and eleven others were appointed special assistants. Eleven of these special assistants filed claims and all but claimant Becker were paid.

We have come to the conclusion that under the Act, particularly section 23-916 thereof, that the contracts of these claimants for services to be rendered in the office of the county assessor were not in violation of that section because of the condition of the assessor's budget at the time they were entered into. We therefore affirm the action of the trial court as to all three claims.

AFFIRMED.

LOUIS MILLER ET AL., APPELLANTS, V. CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, APPELLEE.
50 N. W. 2d 824

Filed January 11, 1952. No. 33080.

1. **Trial.** Action of the district court in making findings of fact not pleaded and basing judgment thereon is prejudicially erroneous.
2. **Eminent Domain.** In an appeal to the district court from the award of appraisers in a proceeding for condemnation of land for the use of a municipal corporation, if the verdict of the jury exceeds the award of the appraisers the verdict bears interest from the date of the appropriation.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded with directions.*

*Mothersead, Wright & Simmons,* for appellants.

*Jack E. Lyman* and *True R. Ferguson,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

By ordinance passed and approved July 5, 1949, the City of Scottsbluff, Nebraska, a municipal corporation, appropriated for the use of the city certain lands within the city belonging to Louis Miller and Pauline Miller. By the ordinance three freeholders were duly appointed appraisers to assess the damages caused by the appropriation. The appraiser duly made an appraisement and assessed the damages at $2,492.50.

From the award the Millers took an appeal to the district court. No pleadings were filed. A transcript containing a copy of the record of the appropriation or condemnation proceedings was filed as the basis of the appeal. A trial was had to a jury in the district court and the jury fixed the amount of the damages at $12,625. The Millers were given judgment for this amount.

The Millers asked interest on this amount from the

date of the appropriation. This was denied. The basis of the denial according to the journal entry of the court was a set-off for use of the property by the Millers from the date of appropriation until the trial which the court found to exceed the proper rate of interest on the award. In other words, interest was computed as requested by the Millers but the value of use was found to exceed the interest, hence there was no award or judgment for interest.

The appeal here is from the allowance of the set-off and the disallowance of interest on the award. The award itself is not under question on this appeal. For convenience the Millers will be hereinafter referred to as appellants and the city as appellee.

No bill of exceptions has come to this court. Pursuant to section 25-1140.01, R. R. S. 1943, appellants indicated their intention not to present a bill of exceptions and the appellee did not request one. The case therefore comes to this court on the transcript of the proceedings of the district court which includes the transcript which came to the district court, orders of the district court, certain instructions, the verdict of the jury, the judgment on the award, the further judgment on the matter of interest and set-off, and appellants' motion for new trial and to set aside judgment.

The appellants present certain assignments of error which depend for determination upon the factual situation as it was developed at the trial in the district court. These of course may not be considered here since as has been pointed out there is no bill of exceptions.

One of the grounds on which the appellants seek a reversal is in substance that set-off for use by the appellants after appropriation of their property by condemnation is not an issuable matter in an appeal to the district court from the award of appraisers. Another, again substantially, is, assuming that it may be an issuable matter if properly presented, that no such question was presented by any pleading or anything in the nature

of a pleading, hence the district court was without power to consider it as an issue and to make an adjudication thereon.

We conclude that it is not necessary in this case to pass upon the former of these two questions.

Reference to the record presented conclusively discloses that no such issue was presented to the district court on appeal by any pleading or anything in the nature of a pleading. The only question presented was the amount of appellants' damages.

This court said in National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N. W. 2d 489: "The action of a trial court in making findings of fact not pleaded and basing a judgment thereon is prejudicially erroneous." See, also, Luce v. Foster, 42 Neb. 818, 60 N. W. 1027; Kulhanek v. Kulhanek, 106 Neb. 595, 184 N. W. 139; Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843.

The verdict of the jury exceeded the award of the appraisers, hence appellants were entitled to interest on the amount allowed by the jury from the date of the appropriation. Sioux City R. R. Co. v. Brown, 13 Neb. 317, 14 N. W. 389, 14 N. W. 407; Kennedy v. Department of Roads and Irrigation, 150 Neb. 727, 35 N. W. 2d 781.

It therefore became the duty of the court after return of the verdict of the jury fixing the damages to compute the interest thereon from the date of the appropriation and to render judgment accordingly.

The judgment of the district court with respect to interest and set-off is reversed and the cause remanded with directions to compute the interest on the damages fixed by the verdict of the jury and to render judgment therefor in favor of appellants.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWARD F. GARBARK, APPELLEE, V. BEN NEWMAN, DOING BUSINESS AS NEWMAN MOTORS, ET AL., APPELLANTS.
51 N. W. 2d 315

Filed January 18, 1952. No. 33049.

1. **Actions: Courts.** An improper transfer of an action at law from the law docket of a district court to the equity docket thereof does not change the character of the action.
2. **Reformation of Instruments.** It is unnecessary to secure a formal reformation of a written instrument where it differs from the true agreement of the parties in order to enforce it or have the advantage of it as a defense as it should have been expressed in the writing.
3. **Juries: Appeal and Error.** The denial of a jury trial over objection of a party in an action at law is error, but it is not in all cases prejudicial error.
4. **Appeal and Error.** The findings of a court in an action at law have the effect of a verdict of a jury and will not be disturbed unless clearly wrong.
5. **Sales: Fraud.** A positive statement of a seller of the condition of personal property made during negotiations for its sale indicating his intention to be bound for the truth thereof, and which was so understood and relied upon by the other party, is an express warranty.
6. ———: ———. Where a purchaser receives what he purchased, and bases his right to rescind on a false representation of its quality, condition, or matter affecting its value, he must show that the representation was material and that he was misled thereby to his damage.
7. **Fraud.** If a misrepresentation is likely to affect the conduct of a reasonable person with reference to a transaction with another person, it is generally material to the contract, and if it is material to the transaction entered into by a person deceived thereby, it is assumed, in the absence of a showing to the contrary, that the transaction was induced by the misrepresentation.
8. ———. A person is justified in relying upon a representation made to him in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth.
9. **Agency.** An agent who fails to disclose the fact of his agency and represents himself as a principal inducing another to deal with him as such is liable and may be treated as principal for all purposes until the fact of his agency is made known, and a person dealing with the agent of an undisclosed principal may, after disclosure, sue either the principal or agent, or both.
10. **Automobiles.** A certificate of title of a motor vehicle is gen-

erally conclusive evidence in this state of the ownership of the vehicle.

11. Sales. Generally a rescission of a contract of a sale of a chattel must be made by the purchaser giving notice to the vendor of his election to rescind and a return of or offer to return the property to him at the place where it was received by the purchaser.
12. Tender. The law does not require vain things, and a formal tender of property is not required if it appears that it would have been futile.
13. Estoppel. A person who has given a reason for his conduct and decision concerning a matter involved in controversy cannot, after litigation has begun, change his position and place or explain his conduct upon a different consideration.
14. Sales. If a buyer of a chattel is entitled to rescind the sale and elects to do so, and if the seller refuses to accept an offer of the buyer to return the goods, the buyer is thereafter presumed to hold the goods as bailee for the seller subject to a lien to secure the repayment of the price paid.
15. Bailments. Generally a bailee is charged with the amount and kind of care of the subject of the bailment that would be exercised by an ordinarily prudent person in the same or similar circumstances.
16. Sales: Automobiles. Under the Uniform Sales Act, if a purchaser of an automobile for legal cause rescinds the purchase and the seller refuses the offer of return of the vehicle, the purchaser becomes a bailee for hire of the property, subject to a lien to secure repayment of the price paid, and is entitled to reasonable compensation from the seller for its care and protection. The purchaser may in such a situation place the property in storage, and if he does, the seller is liable for and may be required to pay the reasonable storage charges as a prerequisite of his securing possession of the property.
17. Sales. The provision of the Uniform Sales Act that the buyer or seller may recover special damages in any case permitted by law authorizes the recovery of special damages without regard to whether the transaction to which they are incidental has been rescinded or affirmed.
18. Damages. The recovery of proximate special damages is recognized in this state.
19. Sales. Generally if a purchaser sues for general damages for breach of the contract of sale, he affirms the contract and cannot thereafter disaffirm it. An exception to, or a situation without the operation of this rule, may exist if one expends money or furnishes material in the improvement of property before dis-

covering the fraud by which he was induced to purchase it. In such a case the purchaser may rescind the contract of sale and also recover the reasonable cost of improving the property or of the repairs made thereon.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Motion to dismiss denied. Judgment affirmed as modified.*

*Sterling F. Mutz,* for appellants.

*Max Kier* and *Charles Bocken,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an action at law based upon rescission by appellee of a contract for the purchase by him from appellants of a used automobile on the ground of breach of express warranty of the condition of the machine, to recover a money judgment for the purchase price paid at the time of the transaction, and for the amount of expenditures made on account of the machine before appellee discovered the falsity of the representations made and that the warranty had been breached.

The district court, on application of appellants and over objection of appellee, transferred the case to the equity docket, denied a demand of appellee for a jury trial of the issues of the case, and heard and decided it without a jury.

The trial court made a general finding for appellee and against appellants, and special findings, in substance: That the claims of appellee as stated in the petition were true; that about August 13, 1949, he purchased from Ben Newman, doing business in Lincoln, Nebraska, as Newman Motors, one of the appellants, who was acting for an undisclosed principal, Roy Kipf, appellant, a 1941 Buick Roadmaster Sport Coupe for $800; that Newman during the negotiations and at the time of the sale at the place of business of Newman

Motors specifically stated and represented to appellee that the cylinder block of the automobile had not been cracked; that appellee believed, relied, and acted upon that statement and would not have made the purchase of the machine if that representation of the condition thereof had not been made to him by the seller; that the statement was false; that Newman knew or should have known it was untrue; that the representation as to the condition of the cylinder block of the car was material to the transaction and to the subject of the sale; that Kipf was the equitable owner of the car and had repaired it shortly before the sale of it to appellee; that Kipf was not a licensed dealer and he put the car in the name of Newman, an authorized used car dealer, for the purpose of having a sale of it made by Newman; that the certificate of title of the car at the time of the sale showed Newman to be the owner thereof; that the purchase price of the car was paid by appellee to Newman, but thereafter the appellants each participated therein and benefited therefrom; that appellee did not discover that the said representation of Newman was untrue until September 29, 1949; that he forthwith rescinded the sale, demanded of Newman the return of the amount appellee had paid for the car, and he offered to return to the situation the parties were in before the sale; that Newman stated he would not accept return of the car, would not return the amount paid by appellee to him, that he had acted only as agent for Kipf, and disclaimed all responsibility in the transaction; and that before appellee discovered that the representations made by Newman to induce the sale were false and untrue, appellee had expended on account of the car in repairs for and improvements thereof the reasonable amount of $127.62, and was entitled to recover from appellants the total sum of $995.62 upon appellee depositing with the clerk of the court a title certificate for the automobile showing title thereto in appellee free from encumbrance except a lien for

storage of the car after return of it was refused by Newman. The certificate of title was deposited as required, and judgment was rendered in accordance with the findings. This is an appeal from that judgment.

The character of this suit, an action at law, was not altered or changed by its transfer from the law docket to the equity docket of the trial court. It did not become an equity case. It was at its inception, continued to be, and is an action at law for the recovery of money. The significance of the transfer of this case to the equity docket of the court was a mere indication of the determination of the trial court to explore the issues of the case and decide them without the presence or assistance of a jury. Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768.

There was no matter presented by the pleadings requiring or justifying the transfer of the case or any proceedings in it other or different than was appropriate and permissible in an action at law. The claim made in the answer of Roy Kipf that the terms of the guaranty of the automobile made at the time of the sale were only partly put in writing, that a part of the terms and conditions of the guaranty were omitted from the writing and existed only in spoken words, that the writing should be reformed to state all the agreement of guaranty made between the parties, and that this was essential to permit appellant to make his defense in the case, did not make it either mandatory or discretionary for the court to send this case to the equity docket and deny appellee a jury trial.

The modern system of practice does not make it necessary to secure a formal reformation of a written instrument, where it differs from the true agreement entered into between the parties, in order to enforce the instrument as it should have been made. Likewise it is now recognized that a defendant is entitled to avail himself of a defense based on the real contract between the parties, where the written instrument fails

to show the true agreement, without first having the instrument reformed. In Central Granaries Co. v. Nebraska L. M. Ins. Assn., 106 Neb. 80, 182 N. W. 582, the court said: "Without the delay and the expense incident to two actions, equity and justice can be administered in a single suit. Considered as an action at law on the insurance contract actually made, the issue of mutual mistake was correctly determined by the jury in favor of plaintiff. * * * There was therefore no error in the overruling of the motion for a directed verdict in favor of defendant on the issue of a mutual mistake." See, also, Annotation, 66 A. L. R. 763; Phenix Ins. Co. v. Gebhart, 32 Neb. 144, 49 N. W. 333; Omaha Fire Ins. Co. v. Dufek, 44 Neb. 241, 62 N. W. 465.

The order transferring the case and the order denying appellee a jury trial were each contrary to law, but the error was neutralized by the events of the litigation. Appellants cannot complain because the case was transferred from the law docket and tried by the court without a jury, because they requested the procedure adopted by the court. The success of appellee in the trial court prevents any complaint from him that he was denied a jury trial. However, the findings of the court in this case have the effect of a verdict of a jury and will not be disturbed unless they are clearly wrong. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. In testing the sufficiency of the evidence to sustain a verdict, admissible testimony tending to support the case of the successful party should be accepted as the truth. Foltz v. Brakhage, *supra;* James v. Hogan, 154 Neb. 306, 47 N. W. 2d 847.

Appellants contest the finding that Ben Newman stated and represented to appellee, at the time of the purchase by him of the automobile, that the cylinder block thereof had not been cracked; that appellee believed, relied, and acted upon the statement and would

not have bought the vehicle if that representation of its condition had not been made to him by the seller; and that the statement was false and it was material to the transaction and the subject thereof.

The parties to the negotiations for and the sale and purchase of the automobile were the appellee and Ben Newman, appellant. The pleadings of the parties assert that the representations by Newman of the condition and the warranty of the vehicle were partly oral and partly in writing. Appellee produced proof that appellant stated and represented during the negotiations and at the time of the sale that the block of the car had never been cracked; that the car was in perfect condition, except it did not have bumper guards, a speedometer, or windshield wipers; that these would be furnished and put on the car by appellant at his expense; and that he would pay one-half of the cost of repair parts and expense of installation of any required to correct any mechanical trouble or deficiency that occurred or developed in the car during 30 days from the date of the sale of it, and the remaining one-half thereof would be the liability of the appellee. The latter part of this is described in the record and noted on the motor vehicle invoice as "Thirty day guarantee 50/50." The quotation is the only part of the representations or warranty evidenced by writing.

There is evidence that appellee believed, relied, and acted upon the representations of Newman and especially his positive statement that the block of the car had not been cracked; that his statement in that regard was false; and the fact that the cylinder block had been cracked or broken affected and reduced the value of the car, made it unsalable and undesirable as security for loan purposes.

Appellant Newman agrees that he promised to equip the car with bumper guards, speedometer, and windshield wipers at his expense. He denies he made any statement about the condition of the cylinder block of the

car, or any other part of it. He asserts that the "Thirty day guarantee 50/50" was the only representation or warranty made to appellee. He says that the trial court erred in failing to find and determine that it was exclusive and since no defect in the car occurred or was discovered within 30 days of the date of the sale of it, except the battery failed and was replaced and the brakes required adjustment which was made, appellee had no cause of action against appellants. The finding of the district court that the condition of the car was misrepresented and that there had been a breach of warranty is sustained by evidence and is not contrary to law. Section 69-412, R. R. S. 1943, provides in part: "Any affirmation of fact * * * by the seller relating to the goods is an express warranty if the natural tendency of such affirmation * * * is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." A positive statement or affirmation of a seller as to the condition of personal property made during negotiations for its sale indicating that he intended to be bound for the truth thereof, and which was so understood and relied upon by the other party to the negotiations, is an express warranty. McGuire v. Thompson, 152 Neb. 28, 40 N. W. 2d 237; Long v. Carpenter, 154 Neb. 862, 50 N. W. 2d 67. Appellee inquired of Newman if the block of the motor of the car had been cracked. His answer in the presence of appellee and a third party was a direct positive statement that it had not been cracked. He emphasized this statement with repetitious and extreme profanity apparently as added assurance that any doubt of appellee in that regard would be wholly dissipated.

The evidence was sufficient to support the finding that the representation as to the condition of the block of the car was material to the contract of sale. It was that an automobile after the block has been cracked is not good security for a loan; that this car would not have been available as collateral for a loan if the defect in

the block had been known; and that such a defect greatly reduces the value of a car and, if it is made known, the car is unsalable. Reduction in the value of this car was estimated at $250. In Cooper v. Marr, 149 Neb. 211, 30 N. W. 2d 563, it is said: "Where, * * * a purchaser receives what he actually purchased, and bases his right to rescind on some false representation as to its quality, condition, or matter affecting its value, he must show that such representation was material, and that he was misled thereby to his injury and damage."

If a misrepresentation is likely to affect the conduct of a reasonable person with reference to a transaction with another person, it is generally material to the contract, and if a misrepresentation is material to the transaction entered into by a person deceived thereby, it is assumed, in the absence of facts showing the contrary, that it was induced by the representation. Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139.

Appellants contend that the break in the cylinder block was plainly visible and could have been seen by appellee if he had looked at that part of the car; that he could not close his eyes to an obvious condition and have legal relief because of its existence. The defect in the block was not easily found or seen. It was below the exhaust manifold, had existed for a considerable time, and was rusted. To see it, one had to get down and look under the manifold. The car had been badly used, had been in an accident, and could only be moved with great difficulty by its power. One of the appellants repaired it at an expense of about $350. He cleaned the motor and did not discover the crack in the block. A buyer of a vehicle is not required to assume dishonesty of the seller in his statements concerning the subject of the sale, and make an independent investigation. A person is justified in relying upon a representation made to him in all cases if it is a positive statement of fact and if an investigation would be re-

quired to discover the truth. Sic v. Loup River Power District, 136 Neb. 506, 286 N. W. 700; Hamaker v. Middaugh, 134 Neb. 440, 278 N. W. 849.

The postulate of appellants that appellee must be denied any relief in this case because he did not discover the untruthfulness of the representation of Newman as to the condition of the cylinder block and did not offer to rescind the contract within 30 days of the sale is without merit. The warranty resulting from that affirmation of a fact material to the contract was not within the limitation made applicable to the so-called "Thirty day guarantee 50/50." It is required that a purchaser of a chattel who desires to rescind a contract for fraud or breach of warranty must act within a reasonable time considering all the circumstances. The question as to what is a reasonable time in this regard cannot be answered by reference only to a period of time. McGuire v. Thompson, *supra.* In this case appellee expressed his desire and intention to rescind the contract the same day he discovered the breach of the warranty of the condition of the cylinder block. Greater alertness was impossible.

Appellants contend appellee did not effectively rescind the contract of sale or show a sufficient waiver of a formal rescission thereof. Roy Kipf, one of the appellants, says that appellee did not give notice to him that appellee desired or intended to or did rescind the contract of sale, and that he did not tender or offer to return the car to appellant or to put him in the situation he was at the time the contract was made. He also says that he does not know what transpired between appellee and Newman after appellee discovered the breach of warranty, but whatever was done or said is unimportant because Newman was only an agent of Kipf for the sale of the car, and the agency had been wholly completed and terminated before that time. Ben Newman, one of the appellants, denies that there was a rescission of the contract and pleads that he was only an agent of

his co-appellant in making a sale of the car, that he fully performed and completed the agency, and was discharged therefrom on August 13, 1949.

There is substantial proof that Newman did not disclose to appellee that he was claiming to act only as agent for Roy Kipf in the negotiations and sale of the car until after appellee discovered on September 29, 1949, that the representation made by Newman as to its condition was false. The car was at the place of business of Newman during the negotiations and at the time of the sale. He made an offer to sell it and fixed the price. When the parties agreed, Newman signed the invoice as owner of the car. The purchase price was paid to him. The certificate of title to the car was in his name and he furnished to appellee a certificate of title. The fact that Newman was attempting to act for an undisclosed principal is immaterial in this case.

An agent who fails to disclose the fact of his agency and represents himself as principal inducing another to deal with him as such is liable and may be treated as principal for all purposes until the fact of his agency is made known. A person dealing with an agent of an undisclosed principal may, after disclosure, sue either the principal or agent, or both. Lincoln Joint Stock Land Bank v. Bexten, 125 Neb. 310, 250 N. W. 84; Jackson v. McNatt, 4 Neb. Unoff. 55, 93 N. W. 425; Dresher v. Becker, 88 Neb. 619, 130 N. W. 275; Saco Dairy Co. v. Norton, 140 Me. 204, 35 A. 2d 857, 150 A. L. R. 1299; Restatement, Agency, § 186, p. 431, § 322, p. 714.

It was not competent or permissible for either of the appellants to attempt to show that Newman was not the absolute and sole owner of the automobile. The certificate of title of it was in his name and was conclusive of his ownership under the circumstances of this case, and appellee was justified in treating him as the owner thereof. § 60-105, R. S. Supp., 1949. See, also, Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913.

Generally a rescission of a contract of sale of a chattel must be made by the purchaser giving notice to the vendor of his election to rescind and return or offer to return the property to the place where it was received by the purchaser, and an offer to place the parties in the situation they were at the time the contract was made as nearly as the circumstances will permit. Parks State Bank v. Fernholz, 111 Neb. 669, 197 N. W. 387; Sherrill v. Coad, 92 Neb. 406, 138 N. W. 567; Mundt v. Simpkins, 81 Neb. 1, 115 N. W. 325, 129 Am. S. R. 670; Linch v. Nebraska Buick Automobile Co., 120 Neb. 819, 235 N. W. 456; James v. Hogan, *supra.*

However, the law does not require vain things, and a formal tender of property is not required if it appears that if made it would have been futile. Star v. Watkins, 78 Neb. 610, 111 N. W. 363; Lapham v. Bossemeyer Bros., 5 Neb. Unoff. 343, 98 N. W. 699; Bundy v. Wills, 88 Neb. 554, 130 N. W. 273, Ann. Cas. 1912B 900; Phelps v. Shuck, 107 Neb. 490, 186 N. W. 313; Mundt v. Simpkins, *supra;* 52 Am. Jur., Tender, § 4, p. 216. See, also, Ross v. First American Ins. Co., 125 Neb. 329, 250 N. W. 75; Cox v. Cox, 124 Neb. 706, 247 N. W. 898; Nelson v. State, 121 Neb. 658, 238 N. W. 110; Hippodrome Amusement Co. v. Redick, 109 Neb. 390, 191 N. W. 317. After Newman had positively stated he would not accept a return of the car and would not refund the purchase price paid to him, it was evident that any further offer or tender by appellee would not have been accepted. Thereafter appellee was not required to take the car to the place of business of Newman and tender it to him.

The first information and knowledge appellee had that the cylinder block of the car had been broken was on September 29, 1949. His wife obtained the information first and verified the truth of it by conferring with the mechanic who discovered the crack while working on the car. She discussed the situation with appellee and she for and on his behalf and with his approval talked with Newman on the afternoon of that day. She told

him the car had a cracked block, the source of her information, that she wanted to return the car, wanted Newman to take the car back, and return the money paid for it. "I told him that we wanted our money back on it." Newman said he would not take the car back and that he would not refund or return the money. He said he would have to refer her to Kipf; that Kipf would have to take the car back; that it was his and did not belong to Newman; that he, Newman, did not have anything to do with it; that it was not his car; and that he could not do a thing about it. Newman continued this position at all times thereafter until this litigation resulted. A person who has given a reason for his conduct and decision concerning a matter involved in a controversy cannot, after litigation has begun, change his position and place or explain his conduct upon another or different consideration. From v. General American Life Ins. Co., 132 Neb. 731, 273 N. W. 36. The finding that the contract of sale had been regularly and sufficiently rescinded and that appellee was entitled to judgment against the appellants for the amount of the purchase price with interest at legal rate from September 29, 1949, is sustained by the proof and is not inconsistent with applicable law.

The automobile, after Newman refused to accept it back and declared he would not return the purchase price to appellee, was placed and kept in storage in the Hartsough Motor Company garage and was there at the time judgment herein was rendered. The storage charge was $15 a month and was unpaid. This was established as fair and reasonable. The court required appellee to and he did deposit with the clerk of the district court a certificate of title of the car showing title thereto in him free of encumbrance, except the storage lien, for the use and benefit of appellants upon satisfaction of the judgment. The legality of this procedure is challenged by appellants.

The Uniform Sales Act provides: "(5) Where the

buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid * * *." § 69-469, R. R. S. 1943. In Elco Shoe Manufacturers v. Thatcher, 231 Mich. 138, 203 N. W. 669, it is said: "The defendants (buyers) returned the shipments to the plaintiff, (seller) who refused to receive them. * * * The defendants took them back and stored them. * * * When the plaintiff refused a return of the goods, it was the duty of the defendants to store them and in doing so the law assumes that they were holding them as bailee for the plaintiff. Uniform sales act (3 Comp. Laws 1915, § 11900)." See, also, Ryder & Brown Co. v. E. Lissberger Co., 300 Mass. 438, 15 N. E. 2d 441, 118 A. L. R. 521; Levy v. Chonavitz, 163 N. Y. S. 658.

Generally a bailee is charged with the amount and kind of care of the subject of the bailment that would be exercised by an ordinarily prudent person in the same or similar circumstances. The observance of ordinary care should be the conduct in every case by a bailee. Peet v. Roth Hotel Co., 191 Minn. 151, 253 N. W. 546; Kubli v. First Nat. Bank, 199 Iowa 194, 200 N. W. 434; 8 C. J. S., Bailments, § 26, p. 261.

Appellee was not a voluntary or gratuitous bailee. His status and responsibility as a bailee was placed upon him by the wrongful refusal of Newman to accept return of the automobile and the law. Appellee was then charged with doing the reasonable and prudent thing to preserve and protect the car from loss, damage, or unusual deterioration. Anything less would subject him to a liability. Prudent persons protect their cars by shielding them from the elements and exposure to the depredation of evil disposed persons toward the property of others. Parking this car in the open would not have been justified. Appellee would then have been subject

to the hazard of liability for damage to or loss of the car. The statement of this court in another case is appropriate here. "When Neville found himself involuntarily in possession of these goods, we think he might preserve them; and for the reasonable worth of the care and preservation of the goods until they were removed the owners were liable." Moline, Milburn & Stoddard Co. v. Neville, 52 Neb. 574, 72 N. W. 854. See, also, Crancer Co. v. Combs, 95 Neb. 403, 145 N. W. 863.

Gant v. Cutting-Larson Co., 110 Misc. 484, 181 N. Y. S. 581, makes reference to the Uniform Sales Act and comments: "The plaintiff, having offered to return the automobile and the offer having been refused, became the bailee for hire of the property and is entitled to the usual charges of bailment or storage after notice to the defendant." In that case, the court further said: "The statute therefore seems to be contrary to the principle, if such there be, as claimed by the defendant, that one cannot make himself the creditor of another without the consent of the latter * * * for the relation of bailor and bailee seems to be created by the statute, regardless of the intention of the parties or their consent or want of consent. * * * In the present case the plaintiff tendered the automobile to the defendant, who refused to receive it, and plaintiff thereupon, * * * stored the automobile in a garage and insured it against the perils of theft and fire and notified the defendant of such action and that the defendant would be held liable for the expense incurred. In so doing the plaintiff sought to make the defendant's loss as light as possible, consistent with the exercise of due care and the proper regard for the right of the defendant in the automobile. Under the circumstances it would seem that the defendant is chargeable with the amount expended for storage and insurance." The record justifies the procedure in this case that required appellants to take the car subject to the charge for its storage after the return of it had been refused by Newman.

Appellee improved the car during the period from its purchase to the time of his discovery that its condition had been misrepresented. The amount he expended for parts, installation thereof, and labor occasioned by the improvements, was $114.77. The appropriateness of these or the reasonableness of the charge for them is not contested. In Mundt v. Simpkins, *supra,* it was determined that: "As a general rule a party who counterclaims for damages for breach of a contract will be held to have affirmed it, and cannot be heard to assert its nonexistence because of its recission (rescission) * * *. An exception * * * may exist where one expends money or material in the improvement of property before discovering the fraud by which he was induced to purchase it, or where the purchase is made on a warranty of its fitness for a prescribed use, and repairs are required to be made before the article can be tested and its fitness for the use ascertained. In such cases the purchaser may rescind the contract of sale and recover the reasonable cost of improving the property or of repairs made thereon."

These expenditures constitute special damages within the Uniform Sales Act. Section 69-470, R. R. S. 1943, contains the following: "Nothing in this act shall affect the right of the buyer or the seller to recover * * * special damages in any case where by law * * * special damages may be recoverable, * * *." This is not in conflict and is not limited or affected by subsection (2) of section 69-469, R. R. S. 1943, that: "When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted." The immediate preceding quoted provision relates to and recognizes the doctrine of election of remedies that when two contemporary inconsistent remedies exist, the election and pursuit of one prevents subsequent resort to the other. James v. Hogan, *supra.*

It has not been the rule in this state that only general damages may be recovered for breach of warranty,

but recovery of proximate special damages has been recognized. Aultman & Co. v. Stout, 15 Neb. 586, 19 N. W. 464; Burr v. Redhead, Norton, Lathrop Co., 52 Neb. 617, 72 N. W. 1058; Long v. Carpenter, *supra;* Yoder v. Nu-Enamel Corporation, 145 F. 2d 420.

The purpose and effect of the provision of the Uniform Sales Act that the buyer or seller may recover special damages in any case where the law permits the recovery of such damages is to permit the recovery of special damages without regard to whether the transaction to which they are incidental has been rescinded or affirmed. Russo v. Hochschild, Kohn & Co., Inc., 184 Md. 462, 41 A. 2d 600, 157 A. L. R. 1070; Uniform Laws Annotated, 1A, Sales, § 70, p. 406.

The motion of appellants for an order dismissing this case should be, and it is denied.

The district court determined and allowed as expenditures made on the car by appellee the sum of $127.62. This is $12.85 in excess of the amount shown by the proof. The judgment of the district court of $995.62 should be, and it is reduced to $982.77, and, as reduced, the judgment should be, and is in all things affirmed.

MOTION TO DISMISS DENIED.

JUDGMENT AFFIRMED AS MODIFIED.

CHAPPELL, J., not participating.

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IDA W. DUMOND, APPELLANT, V. LEWIS W. DUMOND, JR. ET AL., APPELLEES.

51 N. W. 2d 374

Filed January 18, 1952. No. 33057.

1. **Wills.** The court, in construing a will, is required to give effect to the true intent of the testator to the extent it can be ascertained from the whole instrument, if such intent is consistent with applicable rules of law.
2. ———. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity.

3. ———. A patent ambiguity in a will is one which appears upon the face of it. Such an ambiguity must be removed by interpretation according to legal principles and not by evidence, and the intention of the testator must be found within the four corners of the will.

4. ———. The intention of the testator by the devise made "to my son Lewis W Dumond Jr. and to my grandson Lewis W Dumond 3d each one undivided half one half interest in my farms located north east of Fairmont" was to vest an undivided one-half interest in the lands described in each of the two specifically named devisees.

APPEAL from the district court for Fillmore County: STANLEY BARTOS, JUDGE. *Affirmed.*

*Keenan & Corbitt,* for appellant.

*C. Russell Mattson,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action to partition 160 acres of land in Fillmore County. The plaintiff alleged that she was entitled to an undivided one-half interest in the land under the provisions of a will executed by her husband, Lewis W. Dumond, Sr., now deceased. The trial court found for the defendants and plaintiff appeals.

The record shows that plaintiff and Lewis W. Dumond, Sr., were wife and husband, residing in California at the time of the husband's death on December 25, 1948. He left surviving him as heirs at law or devisees under his will, Ida W. Dumond, his wife, the plaintiff herein, and the defendants Lewis W. Dumond, Jr., a son, and Lewis W. Dumond III, a grandson. All are of adult age and competent.

The deceased, Lewis W. Dumond, Sr., left a holographic will which was duly admitted to probate in the State of California. Ancillary proceedings for the probate of the will in this state were had in Fillmore County. The will was admitted to probate on April 29, 1949, and

no appeal was taken. The plaintiff alleges that the will devises an undivided one-half interest in the land to her and an undivided one-fourth interest to each of the defendants, Lewis W. Dumond, Jr., and Lewis W. Dumond III. The defendants assert that the will devises an undivided one-half interest in the land to each of the defendants and that the plaintiff has no interest therein under the terms of the will.

The provision of the will giving rise to the dispute is as follows: "I devise to my son Lewis W Dumond Jr. and to my grandson Lewis W Dumond 3d each one undivided half one half interest in my farms located north east of Fairmont, County of Filmore Nebraska the legal description being East ½ of South East ¼ of section 3 and south ½ of North West ¼ sec. 2." The meaning of the words "each one undivided half one half interest in my farms" controls the result of the case as to the issues presented here.

In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law. Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797; Dennis v. Omaha National Bank, 153 Neb. 865, 46 N. W. 2d 606. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. Borah v. Lincoln Hospital Assn., 153 Neb. 846, 46 N. W. 2d 166. Such evidence is not admissible to determine the intent of the testator where the ambiguity is patent and not latent. In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739. A patent ambiguity is one which appears upon the face of the instrument. It must be removed by construction according to settled legal principles and not by evidence, and the intention of the testator is to be determined from the four corners of the will itself. The controverted provision of the will in the case here presented is one appearing upon

the face of the instrument and is therefore a patent ambiguity.

The intent of the testator in using the words "each one undivided half one half interest in my farms" must therefore be ascertained within the four corners of the will without the assistance of extrinsic evidence. The will was wholly in the handwriting of the testator. That the testator was a layman unskilled in the drafting of wills is self-evident. No other specific devise appears in the will. The residuary clause makes the plaintiff the residuary devisee and legatee. If, as contended by the plaintiff, the disputed words devise only an individed one-fourth interest to each of the two defendants, the plaintiff takes one-half as the residuary devisee under the will.

In determining the intent of the testator when he used the controverted words, the court should place itself in the shoes of the testator, ascertain his intention, and enforce it. In so doing it is important to remember at all times that the testator was unskilled in the field of will drafting. It seems clear to us that the testator intended to dispose of his farms in Fillmore County by specific devise. In so doing he specifically named only his son, Lewis W. Dumond, Jr., and his grandson, Lewis W. Dumond III. His wife is not mentioned. The disputed words do not mention a one-fourth interest in connection with the devise of the lands in question. If a one-fourth interest had been intended for anyone, it would have been easy and natural for even a layman to have said so in plain and unambiguous language. It seems to us that, when the testator names but two devisees and describes the undivided interests devised in terms of halves and one-halves and not by one-fourths, it indicates an intent to devise an undivided one-half to each of the two named devisees. This result is further supported, we think, by a general tendency on the part of a layman to dispose of the whole of the property

being devised in terms due to the fact that a layman would not ordinarily be familiar with the effect of a residuary clause upon a portion not devised. The plaintiff argues that the disputed words should be read as if the testator had made them read: "each one undivided half of one-half interest." It seems more consistent to us to say that the word "of" was intentionally left out and that the testator intended the words "one half interest" as a tautegorical explanation of the devise of an undivided half to each of the specifically named devisees. Such an intention is consistent with the general pattern of the will, the gift of the farms to the son and grandson of the testator, and all the rest of his property to his wife. We conclude that the testator intended by the language in question to devise an undivided one-half interest in the lands described to each of the two specifically named devisees, Lewis W. Dumond, Jr., and Lewis W. Dumond III, and that any other property, real or personal which he had or subsequently acquired, was to go to the plaintiff under the terms of the residuary clause of the will. The trial court so found and, we think, correctly so.

AFFIRMED.

WENKE, J., dissenting.

I dissent from the majority holding because, in my opinion, it does not give the ordinary and natural meaning to the language used by the testator in the following sentence of his will: "I devise to my son Lewis W Dumond Jr. and to my grandson Lewis W Dumond 3d each one undivided half one half interest in my farms located north east of Fairmont, County of Filmore Nebraska the legal description being East ½ of South East ¼ of section 3 and south ½ of North West ¼ sec 2." (Underscoring mine.)

The majority holding has the effect of eliminating from this sentence either the word "half" or words "one half." From the very beginning in the study of

arithmetic I was taught that half one half equals one fourth.

SIMMONS, C. J., and MESSMORE, J., concur in this dissent.

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WILLIAM SEMRAD ET AL., APPELLEES, V. JOSEPH E. SEMRAD ET AL., APPELLEES, IMPLEADED WITH HARRY E. STEVENS, APPELLANT.
51 N. W. 2d 264

Filed January 18, 1952. No. 33068.

1. **Estates.** Where the grantor conveys real estate to a life tenant with remainder to the children of the life tenant, all children of the life tenant whether in being or born thereafter during the continuance of the life estate are included as remaindermen.
2. **Deeds: Estates.** Where the language of a deed conveying a remainder interest to a class does not provide for a defeasance in case of the death of one of the class during the continuance of the life estate the vested interest of such member of the class does not lapse but descends to his heirs.

APPEAL from the district court for Saunders County: HARRY D. LANDIS, JUDGE. *Affirmed.*

*Stevens & Powell,* for appellant.

*Joseph L. Pallat, H. A. Bryant,* and *Joe R. Broz,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by William Semrad and Erma Semrad, plaintiffs and appellees, against Harry E. Stevens, one of the defendants and the appellant herein, and others for the partition of 160 acres of land in Saunders County, Nebraska.

The question of the right to partition is not in issue. The only question for determination is that of apportionment of interests on partition. The apportionment

depends upon the meaning of a provision contained in a certain deed executed and delivered by one Josef Janecek and Marie Janecek, his wife, on August 17, 1892. The facts are not in dispute.

By the deed the land was conveyed to Mary Semrad, a daughter. The deed contains the following provision: "Grantors reserve the right that Mary Semrad (their daughter) can not convey or sell the above described land to any person during her natural life, and in case of Mary Semrad death said above described land should be divided among her hown children, and in case there should be no children after Mary Semrad then in that case the above described land should revert back to the Grantors above mentioned."

Nine children were born to Mary Semrad. Mary Semrad died October 19, 1949. Two of her children predeceased her. The two left surviving children. These children were living at the time Mary Semrad died.

Harry E. Stevens at the time of the commencement of the action in the district court and at the time of trial was the owner of the interests of three of the surviving children of Mary Semrad in this real estate.

William Semrad, one of the surviving children, instituted this action for partition wherein he contends that his interest and that of each of the other surviving children is one-ninth and that the children of each of the deceased children of Mary Semrad have a one-ninth interest therein.

The appellant, Harry E. Stevens, contends that under a proper interpretation of the quoted provision of the deed only the children of Mary Semrad who were living at the time of her death have an interest in the land and that he as the owner of the interests of three of these has a three-sevenths interest in the land.

The district court found and decreed that under the deed the interest of each of the seven living children was one-ninth; that the interests of the children of each of the deceased children was one-ninth; and that in consequence

as successor in interest the appellant was the owner of three-ninths instead of three-sevenths. It is from the determination upon this issue that the appeal has been prosecuted.

Unless we are to depart from the clear, positive, and recent pronouncement of this court the action of the district court is to be sustained.

The case of Strawhacker v. Strawhacker, 132 Neb. 614, 272 N. W. 772, in point of ultimate fact upon which the legal determination depended was not different from the case at bar.

In that case John Jury and Mary E. Jury on December 1, 1883, conveyed 80 acres of land to Andrew M. Strawhacker by deed. The habendum clause of the deed contained the following provision: "to Andrew M. Strawhacker for and during his natural life and at his death, to his present wife Genevieve and her children. Now of the town of Minonk, county of Woodford and state of Illinois." The concluding sentence of the quotation had significance in the consideration in that case but it has none herein.

On the date of the execution and delivery of the deed Genevieve Strawhacker had one child. Subsequently seven additional children were born. Andrew M. Strawhacker died October 15, 1922. The child born before the execution and delivery of the deed died December 28, 1918, leaving a widow and one son. One of the seven died April 15, 1891.

After reviewing the authorities which are fully set forth in the opinion in that case this court said: "We are convinced that, at the time of the execution and delivery of the deed, Andrew M. Strawhacker became vested with a life estate and that the remainder interest vested in his wife, Genevieve, and her only son then in being, Orville Strawhacker, subject to the condition that the class will open up and let in other children born during the continuance of the life estate."

It was also said, and this is apropos here since here

there is no provision for defeasance as was also true there: "It will be noted that the clause in the deed does not provide for a defeasance of the vested interest of any child, either by the death of the child or otherwise. In such case the vested interest of a child does not lapse at his death but descends to his heirs. In the instant case, each of the eight children and Genevieve Strawhacker became vested with an undivided interest in the land as they entered the class. At the termination of the life estate by the death of Andrew M. Strawhacker, the grantee of the life estate, the number within the class became fixed and the absolute interest of each at that time would necessarily be an undivided one-ninth interest in the premises."

Nothing has been presented which warrants a departure from the authority of this opinion. The decree of the district court is therefore affirmed.

AFFIRMED.

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DAN ALLEN ET AL., APPELLANTS, V. GORDON TOBIN, CITY CLERK OF THE CITY OF SIDNEY, NEBRASKA, ET AL., APPELLEES.
51 N. W. 2d 338

Filed January 18, 1952. No. 33075.

1. **Statutes.** In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent so deduced from the whole will prevail over that of a particular part considered separately.
2. ———. The fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself, and it is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language.
3. **Intoxicating Liquors: Statutes.** Section 53-1,118, R. S. 1943, provides for a liberal construction of the Liquor Control Act.
4. **Elections.** Any election at which there is a general popular

expression of the public will, whether that election be a state, county, or city election, is a general election.

5. ———. Article XVII, section 4, of the Constitution of Nebraska, and section 32-101, R. S. 1943, define a general state election, and are not conclusive to the extent of including a general municipal election.

6. **Intoxicating Liquors: Elections.** The following language appearing in section 53-122, R. S. 1943, "If a sufficient petition shall be signed by the electors of any such city or village of such number as shall equal twenty per cent of the votes cast at the last general election held therein," means a petition signed by the electors of any such city or village of such number as shall equal twenty percent of the votes cast at the last general municipal election held therein.

7. ———: ———. When a petition meets the requirements of section 53-122, R. S. 1943, to submit to the electorate of any city or village the proposition of sale of alcoholic liquors by the drink, except beer, such petition vests jurisdiction in the proper city officials to call an election for such purpose.

8. ———: ———. Under the provisions of the Liquor Control Act, section 53-122, R. S. 1943, liquor may be sold by the drink in any city or village where the people thereof authorize it.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Affirmed.*

*Edward E. Carr* and *Ivan Van Steenberg*, for appellants.

*J. H. McNish* and *L. M. Clinton*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action in equity brought by the plaintiffs to enjoin the city clerk of the city of Sidney, a city of the second class, from certifying returns of an election held in the city for the sale of alcoholic liquor by the drink, except beer, to the Nebraska Liquor Control Commission, and to enjoin the city council, named as defendants, from issuing any license or licenses to any applicant or applicants who may apply for the same, on the ground that the election so held was illegal and void.

The trial court entered the following judgment, in substance: This court does not have jurisdiction to enjoin any of the defendants herein from canvassing, publishing, or otherwise recognizing the results of the election held April 4, 1950. The plaintiffs and the persons whom they allege they represent were, on April 18, 1950, entitled, as electors of the city of Sidney, Nebraska, to institute contest proceedings in accordance with the law. Such right constitutes an adequate remedy at law, and by reason thereof said plaintiffs here have not shown themselves to be entitled to the issuance of an injunction. The plaintiffs' cause of action was dismissed with prejudice at plaintiffs' costs.

Plaintiffs filed a motion for new trial which was overruled. From the overruling of the motion for new trial plaintiffs perfected appeal to this court.

The facts are not in dispute and for the most part are stipulated. The record shows that Gordon Tobin was the city clerk of Sidney, Nebraska, on March 3, 1950, was reelected to the same position April 4, 1950, and has been continuously the city clerk at all times mentioned, and also shows the members of the city council serving during the period of this controversy. A petition in five parts was filed with the city clerk on March 3, 1950, containing 203 signatures of persons. Five of the petitioners who signed the petition did not live within the corporate limits of the city of Sidney, leaving 198 signatures of persons living in the city. The poll books show that at the last general state election held in November 1948, prior to April 4, 1950, 1,993 votes were cast in the election districts of which the corporate limits of the city of Sidney are a part, and 565 voters voted in the general municipal election held on April 4, 1949, in the city of Sidney. Notice of such election, based on the petition filed, was published as provided for by statute, and the question was placed on the ballot and voted on. Certain of the plaintiffs and others appeared at the city council meetings after March 3, 1950, and before the

general municipal election on April 4, 1950, to wit, on March 17 and March 24, 1950, and protested against the sufficiency of the petition, its legality, and the right of the city council to place upon the ballot the question of licensing the sale of alcoholic liquors, except beer, by the drink to be submitted to the electors of the city of Sidney at the next general municipal election on April 4, 1950, according to the provisions of Chapter 53, section 53-122, and other applicable sections of the Revised Statutes of Nebraska, 1943. The minutes of the meeting of the city council of March 24, 1950, show that the city attorney ruled that the petitions presented to the city council on March 3, 1950, petitioning for the sale of liquor by the drink in the city of Sidney and requesting that the licensing of the same be submitted to the electors of the city at the next general election were legal and valid. The city clerk was instructed to proceed with the election and the printing of the ballots according to the statutes of Nebraska. A written protest was made to the city clerk and received on April 3, 1950, protesting that the petition submitted to the city council was invalid on the basis that it did not comply with section 53-122, R. S. 1943, the Nebraska Liquor Control Act. This written protest was in support of verbal protests made to the city council on March 17 and March 24, 1950.

For convenience we will refer to the parties as designated in the district court, and the city of Sidney as the city.

The plaintiffs' assignments of error pertinent to a determination of this appeal may be summarized as follows: (1) The trial court erred in finding and decreeing that it had no jurisdiction over the subject matter of the action; (2) the trial court erred in finding that the injunction to prevent an election would have to be for the protection of public funds to prevent waste or expenditure for an illegal purpose; (3) the trial court erred in finding that the matter here involved could

be determined only by an election contest; and (4) the trial court erred in dismissing the plaintiffs' action.

In 1935, the Legislature of this state passed the Liquor Control Act, the purpose of which is to govern and control the manufacture, sale, giving away, barter, carriage, possession, and use of alcoholic liquors in the state. Under the provisions of the act liquor may be sold by the drink in a city or village where the people thereof authorize it. State ex rel. Johnson v. Hash, 144 Neb. 495, 13 N. W. 2d 716. See, Chapter 53, R. S. 1943, and amendments thereto.

The Liquor Control Act is an independent act dealing solely with the control of alcoholic liquors. See State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1.

Section 53-122, R. S. 1943, sets forth the entire procedure to be followed in submitting the proposition of selling liquor by the drink in any municipality. The provisions of this section of the statute relative to the calling of a special election are not here involved. The petitioners, under this section of the statute, are required to meet certain technical requirements which are not here involved.

We summarize section 53-122, R. S. 1943, insofar as the same is applicable to the issue presented in this appeal. The commission may issue licenses for the sale of alcoholic liquors, except beer, by the drink, subject to all the terms and conditions of the act, in all cities and villages in this state if a sufficient petition shall be signed by the electors of any such city or village of such number as shall equal 20 percent of the votes cast at the last general election held therein, which shall request that the question of licensing the sale of alcoholic liquors, except beer, therein by the drink be submitted to the electors thereof and shall be presented to the municipal clerk of the governing body thereof. The question of licensing the sale of such alcoholic liquors by the drink may also be submitted at any general municipal election, except as otherwise provided in section

53-121, R. S. 1943, in any city or village in this state upon the filing with the municipal clerk of the governing body of such city or village of a petition signed by electors of such city or village of such number as shall equal 20 percent of the votes cast at the last general election held therein. In speaking of the petition, the statute reads as follows: "At the top of each sheet shall be stated the proposition * * * to be submitted and the date of the general municipal election at which it is proposed to be submitted. * * * Such petition shall be filed thirty days prior to the day of the general municipal election at which the proposition is to be submitted, * * *. Upon the ballot either at the special election hereinbefore provided (which we have purposely eliminated) or at any general municipal election, the proposition * * * shall be stated as follows: * * *." Then the proposition is stated. The provisions of the statutes of this state relating to election officers, voting places, election apparatus and blanks, preparation and form of ballots, information to voters, delivery of ballots, calling of elections, conduct of elections, manner of voting, counting of votes, records and certificates of elections, and recounts of votes, so far as applicable, shall apply to voting on the proposition or propositions under the provisions of this act.

It is the plaintiffs' contention that the signatures upon the petition required by section 53-122, R. S. 1943, must be by electors of such city or village of such number as shall equal 20 percent of the votes cast at the last general election held therein, and this means the last general state election, as distinguished from a general municipal election.

It will be observed that "general election" and "general municipal election" are both used in this section of the statute. It is also apparent that this section of the statute vests the city with local option, that is by vote to either affirmatively endorse the proposition of sale of liquor by the drink, except beer, or to reject it.

Contra, the defendants contend that the language used in the section, "last general election held therein" means the last regular or general municipal election held in the city of Sidney.

There are certain well-established rules with reference to construction of statutes.

The Supreme Court gives a broad and comprehensive meaning to all statutes in order to arrive at legislative intent. Miller v. Schlereth, 151 Neb. 33, 36 N. W. 2d 497.

Section 53-1,118, R. S. 1943, provides for a liberal construction of the Liquor Control Act.

The fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself, and it is not the court's duty nor within its province to read a meaning into a statute that is not warranted by the legislative language. Knox County v. Perry, 142 Neb. 678, 7 N. W. 2d 475.

In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent so deduced from the whole will prevail over that of a particular part considered separately. In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85; In re Application of Silberman, 153 Neb. 338, 44 N. W. 2d 595.

With the foregoing rules in mind we proceed to a determination of this appeal.

Ordinarily, a general election is one provided for by law for the election of officers throughout the state, or certain subdivisions thereof, after the expiration of the full terms of the former officers. See 29 C. J. S., Elections, § 1, p. 12.

A regular or general election is one which recurs at stated intervals as fixed by law; it is one which occurs at stated intervals without any superinducing cause other

than the efflux of time. In the application of the foregoing rules, it is held that the term "general election" embraces a regular annual municipal election. See 18 Am. Jur., Elections, § 5, p. 181.

Any election at which there is a general and popular expression of the public will, whether that election be a state, county, or city election, is a general election. See, Wing v. Ryan, 255 App. Div. 163, 6 N. Y. S. 2d 825; State ex rel. Griffin v. Superior Court, 70 Wash. 545, 127 P. 120.

In the case of State ex rel. Castle v. Schroeder, 79 Neb. 759, 113 N. W. 192, this court in defining the term "general election" said: "One appointed to fill a vacancy in the office of alderman of a city of the first class having more than 40,000 and less than 100,000 inhabitants holds only until the next general election * * * which is the next election at which the vacancy can be filled * * *, to wit, the next regular municipal election." The court went on to say: "The words 'general election' have no uncertain meaning in this state, and, when used with reference to city elections without any qualifying words, must mean the election for municipal officers in general."

Article XVII, section 4, of the Constitution of Nebraska, which defines general state election, states: "The general election of this state shall be held on the Tuesday succeeding the first Monday of November in the year 1914 and every two years thereafter."

Section 32-101, R. S. 1943, provides the general election of this state shall be held on Tuesday succeeding the first Monday in November in each even-numbered year, thus stating the time the general state election is to be held.

Section 32-201, R. S. 1943, provides: "All state, district, county, precinct and township officers, by the constitution and laws made elective by the people, except school district officers and municipal officers in cities and villages, shall be elected at a general election to

be held at the time provided by section 32-101; Provided, that all elective officers of cities of the metropolitan class shall be elected at a regular or general city election which shall be held on the first Tuesday after the second Monday in May, 1945, and each three years thereafter."

Article XVII, section 4, of the Constitution of Nebraska, and section 32-101, R. S. 1943, define only one type of general election, namely the state general election, and it is apparent by section 32-201, R. S. 1943, where the language used is "at a general election to be held at the time provided by section 32-101," indicates that there is more than one type of a general election. We conclude that Article XVII, section 4, of the Constitution of Nebraska, and section 32-101, R. S. 1943, are not conclusive in that there is only one type of general election, and the Legislature did not so intend, as we have previously pointed out.

The plaintiffs contend that in construing a statute, courts will take judicial notice of events which are generally known, and matters of common knowledge within the limits of their jurisdiction. Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason, as well as the meaning of the particular provisions of it. See Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 93 Am. S. R. 431, 55 L. R. A. 740.

The plaintiffs in this connection assert that the statute now being interpreted by this court was first engrossed in its embryonic form and read, as far as necessary to consider here, as follows: "* * * a sufficient petition shall be signed by the electors of any such city or village of such number as shall equal thirty-five per cent of the votes cast at the last general municipal election held therein * * *." As finally passed and now a part of section 53-122, R. S. 1943, this section reads: "* * * a sufficient petition shall be signed by the elec-

tors of any such city or village of such number as shall equal twenty per cent of the votes cast at the last general election held therein, * * *."

It will be observed that in this part of the section being discussed as it appears now the word "municipal" does not appear before the word "election" as it did in the first instance. The section of the statute in controversy is plain and clear in that it refers to a purely local governmental unit, in this instance the city of Sidney, and requires, in order to present to the electors of the city the proposition of sale of alcoholic liquors by the drink, except beer, that there must be a sufficient petition signed by the electors of the city of such number as shall equal 20 percent of the votes cast at the last general election held therein, meaning, as we interpret the statute, in the city of Sidney.

For the reasons given in this opinion, we conclude that the language used in section 53-122, R. S. 1943, "the last general election held therein" means the last general municipal election held in the city of Sidney. This being true, the petition, by admission, contained 198 signatures, which equals 20 percent of the votes cast at the last general election held in the city of Sidney, and was sufficient to vest jurisdiction in the proper city officials to call the election, which was done and held on April 4, 1950, where the proposition of the sale of alcoholic liquors by the drink, except beer, was submitted to the electorate of the city and carried by an affirmative vote, as admitted in the record.

Other assignments of error need not be determined in view of our holding.

The judgment of the trial court in dismissing the plaintiffs' petition with prejudice at plaintiffs' costs is affirmed.

AFFIRMED.

JOHN P. JOHNSTON, APPELLANT, V. CECIL O. L. JOHNSTON, APPELLEE.
51 N. W. 2d 332

Filed February 1, 1952. No. 33063.

1. **Appeal and Error.** In determining an appeal in equity involving questions of fact, this court is required to reach an independent conclusion without regard to the findings of the district court; yet in determining the weight of the credible evidence, where there is an irreconcilable conflict on a material issue, it will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Fraud: Cancellation of Instruments.** Where it is sought to set aside a written instrument, and more especially one which has been executed with the formality of being signed in the presence of witnesses and acknowledged before a notary public, on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a higher quality of evidence than in a case where there are no such presumptions to overcome.
3. **Fraud.** In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Affirmed.*

*Jay P. Gibbs* and *John A. McKenzie*, for appellant.

*Gray & Brumbaugh*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

In this action plaintiff sought to have a deed declared

null and void, to quiet the title in him to two certain pieces of real estate, and to decree that defendant had no right, title, or interest in personal property purportedly conveyed in a bill of sale by plaintiff to defendant. The action is one based on alleged fraud of the defendant. Issues were made and trial was had resulting in a decree dismissing plaintiff's petition and holding that the deed and bill of sale were in all respects valid, subject to the terms of a condition to which reference will hereinafter be made. Plaintiff appeals. We affirm the decree of the trial court.

Plaintiff and defendant are father and son. Reference will be made herein to a lady who at the inception of this controversy was named Dolly Powell and later became the wife of the plaintiff. For convenience she will be referred to herein as Dolly, that being the name often used in the evidence.

Before undertaking to summarize the pleadings as to the issues presented, we state the fact situations about which there appears to be no material dispute in the pleadings and evidence.

Plaintiff was a man 81 years of age at the time of trial. The defendant, his only son, was 55 years of age at the time of trial. Plaintiff and defendant's mother were married in 1893. Plaintiff and defendant are chiropractors by profession. The mother was also a chiropractor. Plaintiff and defendant's mother began the practice of their profession in Omaha some 35 years ago and continued the practice thereafter in Omaha.

In 1916, the first piece of real estate involved in this action was bought, title being taken in the name of the plaintiff. We refer to it as the Locust Street property. In 1941, the title to this property was conveyed to plaintiff and the mother as joint tenants with right of survivorship. It appears that this property later was sold under contract and that that contract was not fully performed when this controversy arose.

The second and more valuable piece of property in-

volved here was purchased in 1925. We refer to it as the Poppleton Avenue property. Title was taken in the names of plaintiff and the mother as joint tenants with right of survivorship. The mother died in May 1948. Upon her death title to both pieces of real estate vested in the plaintiff without probate proceedings. For several years plaintiff and the mother officed and lived in this property.

The defendant practiced his profession at various places. At times he was with plaintiff and the mother. In 1948, he was at St. Louis, Missouri. He came to Omaha and assisted plaintiff and the mother during her last illness. Thereafter plaintiff and defendant went to Europe and on their return defendant entered the practice with plaintiff. There is some contention as to whether or not a partnership existed. It is not material.

The Poppleton Avenue property was remodeled so as to provide basement offices for plaintiff and defendant. There the two parties lived and practiced their profession in a relationship that was close and cordial and one of mutual trust and confidence, both personally and professionally. They do not appear to have made with each other an exact accounting of income or expenses.

Dolly was a woman of mature years, employed in Omaha. For many years she had been a tenant in the Poppleton Avenue property. She continued as a tenant after the mother's death. Her relationship with the plaintiff, the defendant, and their families was cordial and friendly.

An attorney, Oscar Johnson, had his offices in his home, a block from the plaintiff's office and home. For 20 years the attorney had done plaintiff's legal work and advised him professionally. He handled the transfer of title of the Locust Street property from single to joint tenancy ownership. He also handled the sale of the Locust Street property for plaintiff, undertook to make collections due on that property, and after the

dispute here involved became acute he represented plaintiff and defendant in the foreclosure of the contract of sale on that property. The attorney was acquainted with the defendant but had never served him professionally.

In 1949, plaintiff and Dolly became engaged to marry. They made a trip to California. Relatives of Dolly suggested they be married there. Plaintiff expressed a desire to talk with the defendant about it. They returned to Nebraska. Defendant was advised of the proposed marriage. He made no objection. The marriage date was set for October 6, 1949, and the ceremony was performed on that evening.

On October 5, 1949, plaintiff signed and acknowledged a deed for the consideration of $1 and other valuable considerations conveying the two pieces of real estate to the defendant and himself. This deed is on a printed form entitled "Warranty Deed—Vesting Entire Title in Survivor." The defendant is named as the first of the two grantees. The deed contains in black-faced capital letters this language: "It being the intention of all parties hereto, that in the event of the death of either of said grantees, the entire fee simple title to the real estate described herein shall vest in the surviving grantee." In two places the words "joint tenants" appear in black-faced capital letters. The deed contains the usual covenants in the printed form. It was witnessed by and acknowledged before the attorney and recorded that day.

Likewise on the same day the plaintiff sold for the consideration of $1 and other valuable considerations "all goods, chattles (sic) and credits owned by me and in my possession located at 1146 South 32nd Street, and at 3202 Poppleton Avenue, Omaha, Nebraska." This instrument is a printed form entitled "Bill of Sale of Personal Property" and was witnessed by the attorney. It also was recorded.

It is against these two instruments that plaintiff directs this action.

Plaintiff alleged that he was engaged to marry Dolly and that they had agreed that in the event of the marriage he, plaintiff, was to "turn over" to Dolly certain bonds, securities, and other property which she was to accept in lieu of the statutory allowance in the event he predeceased her. Plaintiff alleged that on October 4, 1949, he advised defendant of the approaching marriage and agreement; that defendant advised plaintiff that such an agreement, to be valid, must be in writing; that defendant would have such an agreement prepared accomplishing the purpose of the agreement; and that under such an agreement plaintiff, although married, would be able to sell and dispose of his lands as though he were single.

Plaintiff further alleged that on the same day defendant advised plaintiff that he had had such papers prepared ready to be executed by plaintiff and Dolly; that plaintiff and defendant went to the office of the attorney above named; that certain instruments were presented to him for signature which he was told would accomplish the above purposes; and that plaintiff believed and relied on the statements made to him and signed the papers.

Plaintiff also alleged that the statements and representations were made for the purpose of cheating and defrauding him of his property and that he had a special trust and confidence in the defendant. Plaintiff alleged that he later learned that the instruments signed were the deed and bill of sale above mentioned; that he was paid no consideration therefor; and that when he learned of the fraud and deception that were practiced upon him, he demanded a reconveyance to him which defendant refused.

Plaintiff prayed that the deed be declared void as having been obtained by fraud, deceit, and deception; that the bill of sale be declared to be void; that title to the

real estate be quieted in him; and that defendant be adjudged to have no interest in the personal property.

Defendant filed an answer and cross-petition. During the trial the issues presented by the cross-petition and prayer for money judgment were withdrawn. Accordingly they need not be set out here.

Defendant by answer denied generally and alleged that the property involved herein was accumulated by the joint efforts of plaintiff and defendant's mother with the assistance of defendant and that there was an agreement and understanding that the property was to be defendant's on the death of the plaintiff, and alleged his version of the transaction which will be set out in discussing the evidence.

After trial, defendant, with consent, filed an amendment to his answer pleading waiver, laches, and estoppel. We do not deem it necessary to set out that pleading.

The court found generally in favor of the defendant on plaintiff's petition, made extended findings of fact, and decreed as first above stated.

The trial of this action consumed several days. The evidence is in irreconcilable conflict on certain material questions. There is much in the evidence that it seems to us is not very material to the decision here. There is much confusion in the evidence.

It appears that there was an oral prenuptial agreement between plaintiff and Dolly. The exact terms are not clear and it became confused as the trial progressed. It further appears, as plaintiff pleads, that the agreement was generally that Dolly should not receive any part of plaintiff's real estate in the event of the marriage and in the event of plaintiff's death before Dolly's death. The evidence indicates that they contemplated a reciprocal exchange of personal property, and in part that was done. It is also apparent that defendant knew of the proposed marriage and in general of the agreement.

In substance, plaintiff's testimony is that on the day

the instruments here involved were executed, defendant advised him that a prenuptial agreement, to be valid, must be in writing and duly executed by plaintiff and Dolly. Plaintiff testified that he told defendant to have the prenuptial agreement drawn and that defendant left for that purpose, returned in three-quarters of an hour, and advised plaintiff that attorney Johnson had the papers prepared. Thereafter plaintiff and defendant went to Johnson's office where plaintiff was presented with and signed the papers and was told that they carried out the agreement. Plaintiff testified that relying on defendant he signed without reading; that the deed was folded so only the signature space appeared; that he left and returned to his office immediately, defendant remaining behind, but catching up and returning to the office with him; and that the recited consideration in the instruments was not paid to him.

From defendant's evidence and that of the attorney, when integrated, it appears that defendant was walking past the attorney's home that noon when the attorney asked about the approaching marriage and inquired about the effect it would have on defendant; that defendant replied it would have none because of the prenuptial agreement; that the attorney told defendant such an agreement had to be in writing; that defendant went home and told the plaintiff of the attorney's statement; that the two then went to the attorney's office; that plaintiff there told the attorney of the agreement with Dolly stating that it involved all his property and asked that such an agreement be prepared; that the attorney advised plaintiff it was necessary that such an agreement be carefully prepared; that he did not have the time to prepare it before the wedding; that the attorney suggested the use of a survivorship deed; that the attorney explained the similarities and dissimilarities in the results that would follow; that the plaintiff said he knew of the operation of a survivorship deed and directed that one be drawn; that the attorney got the legal

description of the properties from his files, prepared the deed, and handed it to plaintiff who read it; that the plaintiff wanted the personal property in the deed but the attorney advised it should be in a bill of sale and one was prepared; that plaintiff signed both papers, and acknowledged the deed and directed their delivery and recording; that plaintiff then left; and that defendant remained while the attorney attached his seal and left, overtaking plaintiff on the way home and paying him the money considerations recited. The defendant then went down town and filed the instruments for recording.

It appears further that later the same day the attorney was advised of the possible completion of the sale of the Locust Street property and in order to enable him to close that transaction plaintiff and defendant executed a deed the next day to the proposed purchaser.

It also appears that either the night of the wedding or the next day or so, plaintiff saw the mention of the transfer in the papers. Plaintiff testified that he found it while looking for announcements of the wedding, and that he called it to the attention of defendant and defendant told him there must be a mistake. This latter statement defendant denies.

Some days later Dolly was advised by a third person that she had seen the notice in the papers, and asked plaintiff about it. Plaintiff investigated the records and said that he then discovered the nature of the instruments he had signed.

On November 1 and 3, 1949, plaintiff surrendered his government bonds and in part took cash and in part had new bonds issued payable to himself and Dolly—she being with him when this was done. There is evidence of a reciprocal transfer of insurance and annuities.

After Dolly knew of the deed and bill of sale the matter became the subject of discussion at different times, plaintiff demanding a reconveyance and Dolly offering

to sign any postnuptial agreement if the reconveyance was made.

Also during this period the attorney began a foreclosure action in the name of plaintiff and defendant on the contract of sale of the Locust Street property. This was with plaintiff's knowledge.

Christmas came with members of defendant's family in the home. In January the matter became acute and plaintiff insisted on a conference with the attorney and defendant. Plaintiff then accused them of fraud and deception. Defendant left the home, at the request of Dolly he said, which she denies. Defendant went to Hastings and engaged in the practice of his profession there. This action was filed April 27, 1950.

During this period and concluding in June 1950, plaintiff wrote the defendant friendly letters about patients, family, friends, etc. There is occasional mention in the letters of this controversy and of plaintiff's dissatisfaction as to what had been done. On June 7, 1950, plaintiff requested that no Father's Day greeting be sent and advised that he was sending back a present received earlier from defendant. In this letter he asserted that he had been defrauded and fooled by the attorney and defendant.

This cause is here as an equity case for trial de novo subject to the often-stated rule that in determining an appeal in equity involving questions of fact, this court is required to reach an independent conclusion without regard to the findings of the district court; yet in determining the weight of the credible evidence, where there is an irreconcilable conflict on a material issue, it will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193; Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393; Wiskocil v. Kliment, *ante* p. 103, 50 N. W. 2d 786. We resort to this rule only to reinforce our independent

conclusion that the weight of the credible evidence is with the defendant.

In addition there are circumstances shown in this record which negative plaintiff's contention that he believed he was signing a prenuptial agreement with Dolly. The testimony shows, and he pleads, that Dolly was to sign the agreement. Yet plaintiff signed; he did not require or ask Dolly to sign, nor did he tell her of the papers he signed. He quite clearly considered the matter as a completed transaction. Obviously he would not have done so if he then believed he was signing such an agreement as he now contends.

Also quite clearly plaintiff went to the attorney's office with the intention and purpose of executing an instrument in writing that would deny Dolly an inheritable interest in his property in the event the marriage was consummated and plaintiff predeceased her. The parties agree that the instruments which he executed have that effect. Plaintiff's complaint is as to the result following the deed which deprives him of a sole right to control and dispose of his property. And yet plaintiff knew of the effect of this sort of a deed; he and his first wife had used that sort of a deed; and plaintiff held title to the real estate as a result of the provisions of such deeds. That he had that understanding with reference to this transaction is demonstrated by his actions with regard to the Locust Street property immediately thereafter. Also, something of the pattern of joint tenancy is shown in the disposition of the bonds which plaintiff and Dolly made within a month following the marriage.

The rule also is: " 'Where it is sought to set aside a written instrument, and more especially one which has been executed with the formality of being signed in the presence of witnesses and acknowledged before a notary public, on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the

most cogent and solemn character, and to outweigh this proof requires a greater quantum of evidence than in a case where there are no such presumptions to overcome. * * * ' " Neihart v. Ingraham, 140 Neb. 818, 2 N. W. 2d 28.

While adhering to this rule, we feel that in the interest of exactness and in accord with the reasoning of our recent decisions, the last clause should be changed to read, "and to outweigh this proof requires a higher quality of evidence than in a case where there are no such presumptions to overcome." In re Estate of Baker, 144 Neb. 797, 14 N. W. 2d 585, 155 A. L. R. 950; Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525; In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417.

We reach the conclusion that plaintiff has not sustained his burden of proof and is not entitled to the relief prayed, and that the decree of the trial court should be affirmed as to the issues presented.

In reaching this conclusion we are not unmindful of the relationship of trust and confidence between the parties here. The rule as to that is: "In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud." Leichner v. First Trust Co., 133 Neb. 170, 274 N. W. 475. The answer is that a finding of fraud is not sustained by this record.

Consistent with his answer, during the course of the trial defendant repeatedly stated that he did not desire the use of the personal or real property here involved or rents derived therefrom during the lifetime of the plaintiff. The trial court included that limitation

in its judgment. Defendant here asks that it be affirmed. On that basis this provision of the decree also is affirmed.

The decree of the trial court is affirmed.

AFFIRMED.

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IRA O. PEEK, APPELLANT, V. AYRES AUTO SUPPLY, APPELLEE.
57 N. W. 2d 387

Filed February 1, 1952. No. 33074.

1. **Workmen's Compensation: Appeal and Error.** A workmen's compensation case is a civil action equitable in character and so triable by this court on appeal.
2. **Workmen's Compensation.** All of the provisions of the Civil Code are applicable and controlling in such a case as they are in any other civil action equitable in nature.
3. **Appeal and Error: Workmen's Compensation.** The filing of a motion for new trial is not necessary in order to obtain review of such a case upon the merits in this court.
4. **New Trial: Appeal and Error.** In order to review errors of law which allegedly occurred during the trial of such a case, a motion for new trial must be timely filed assigning such errors therein, and they must also be subsequently assigned and discussed in the brief filed in this court on appeal, or they will not ordinarily be considered.
5. ———: ———. However, a motion for new trial is not a necessary prerequisite in such a case in order for this court to search the record, try the case de novo thereon, and render such judgment as should have been rendered.
6. **Workmen's Compensation.** As provided in section 48-121, R. S. Supp., 1951, subdivision 2, the compensation for disability partial in character shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but compensation awarded thereunder shall not exceed the maximum provided therein.
7. ———. Where the evidence discloses that further medical, hospital, and surgical services would not definitely improve the condition of an injured employee, and where such improvement would be conjectural, the employer's liability under section 48-120, R. S. 1943, to furnish reasonable medical and hospital services and medicines, as and when needed, ceases.

8. **Witnesses.** A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a special contract, entitled only to the statutory fee.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

*Armstrong & McKnight,* and *Paul P. Chaney,* for appellant.

*Fraser, Connolly, Crofoot & Wenstrand,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

In this case plaintiff appealed from a judgment rendered by the district court in the trial de novo of a workmen's compensation case, as directed in a former opinion of this court, reported as Peek v. Ayres Auto Supply, 153 Neb. 239, 44 N. W. 2d 321. The trial court found, and it is conceded that on May 1, 1946, plaintiff, a salesman for defendant, sustained personal injuries arising out of an automobile accident which occurred in the course of his employment by defendant. Concededly, also, plaintiff was employed by defendant from September 10, 1945, to May 1, 1946, and was paid $1,155 salary plus $32.55 commissions, or a total of $1,187.55 during such period. It will be observed, therefore, that during such period of 33.17 weeks plaintiff earned $35.80 a week.

The trial court found and adjudged that plaintiff should recover $18 a week for 105 weeks from and after May 1, 1946, for temporary total disability; that thereafter he should recover $13.50 a week for 175 weeks for 75 percent temporary partial disability; and that thereafter plaintiff should recover $18 a week for 17½ weeks *"for 50% loss of right ear."* (Italics supplied.) In that connection, there is no disagreement with reference to loss of plaintiff's ears, and the aforesaid italicized lan-

guage concededly should be corrected to read: "for 50% loss of his left ear and 20% loss of his right ear," in order to conform with the evidence and applicable statute, section 48-121 (3), R. S. Supp., 1951. Concededly, also, defendant was properly given credit for $1,350 compensation already paid by defendant.

Further, it was ordered and adjudged that plaintiff should recover $350 traveling expenses to and from his home for medical treatment and that he should be reimbursed for certain medical and hospital expenses paid by plaintiff. Also, defendant was given credit for certain medical and hospital expenses already paid by it, and was required to pay certain others.

In this court plaintiff substantially assigned that: (1) The findings of fact are not conclusively supported by the evidence as disclosed by the record; (2) the trial court erred in failing to find that plaintiff was entitled to compensation for total and permanent disability; (3) erred in computing the compensation due plaintiff for 175 weeks for 75 percent temporary partial disability at $13.50 a week in that the findings of fact do not support such an award; and (4) erred in its findings and judgment for medical and travel expenses, and in its failure to find that plaintiff needed further medical services for which defendant should be liable. With regard to such assignments, we conclude that the first should be sustained, and in a trial de novo sustain the third and fourth, but do not sustain the second.

Defendant cross-appealed, assigning that the trial court erred in allowing any temporary partial disability. We conclude that the assignment should not be sustained.

At the outset of this appeal, defendant contended that since plaintiff filed no motion for new trial, this court was limited to an examination of the pleadings to determine whether or not the judgment was responsive thereto. Consequently, defendant argued that the judgment must be affirmed without a trial de novo, on the record. We conclude that such contention has no merit,

A compensation case is a civil action, equitable in character, and so triable by this court on appeal. Lincoln Packing Co. v. Coe, 120 Neb. 299, 232 N. W. 92. We have concluded that such is ordinarily true whether the action was tried in the district court under section 48-181, R. S. 1943, or section 48-182, R. S. 1943. Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212.

As stated in Meester v. Schultz, 151 Neb. 614, 38 N. W. 2d 739: "All of the provisions of our Civil Code are applicable and controlling in a workmen's compensation case as they are in any other civil action equitable in nature. See Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366." See, also, Schmidt v. City of Lincoln, 137 Neb. 546, 290 N. W. 250.

Further, this court has concluded that the filing of a motion for new trial is not necessary in order to obtain review of a workmen's compensation case upon the merits in this court. Hansen v. Paxton & Vierling Iron Works, 135 Neb. 867, 284 N. W. 352.

In the light of the foregoing, the applicable rule, as in equity cases, must be that in order to review errors of law which allegedly occurred during the trial of a workmen's compensation case, a motion for new trial must be timely filed, assigning such errors therein, and they must also be subsequently assigned and discussed in the brief filed in this court on appeal, or they will not ordinarily be considered. Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447; Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482. However, we are not presented here with any such alleged errors of law.

Rather, plaintiff's assignments depend for solution and decision entirely upon a review of the evidence appearing in the record and statutes applicable thereto. In such a situation a motion for new trial is not a necessary prerequisite in order for this court to search the record, try the case de novo thereon, and render such judgment as should have been rendered. Werner v. Nebraska

Power Co., 149 Neb. 408, 31 N. W. 2d 315; Beam v. Goodyear Tire and Rubber Co., 152 Neb. 663, 42 N. W. 2d 293.

By stipulation, all evidence adduced at the first trial, which began on November 1, 1949, was received in evidence at a further hearing on December 19, 1950, after the judgment had been reversed and the cause had been remanded for trial de novo, whereat, by stipulation, additional evidence was adduced by both parties.

When the accident occurred, plaintiff was driving a Chevrolet two-door sedan furnished by defendant. At the crest of a hill he swerved right to avoid an on-coming car in his lane of travel. His car then went out of control, from one side of the highway to another, and turned over several times, throwing plaintiff's head out through the windshield and back again. Whether or not he was rendered unconscious for any period of time after the accident is conjectural. In any event, when plaintiff was able, he attempted to flag down several cars without success, until eventually two men who knew him stopped and took him to a hospital at Auburn. There two physicians were called, who administered surgical and medical treatment. After the accident, it was found that 50 percent of plaintiff's left ear and 20 percent of his right ear had been completely severed. He had a long deep cut from back of his right ear downward across his jaw, almost half way to the corner of his mouth. His head was swollen and aching. Both sides of his face were numb, some of his teeth were loosened, his jaw ached, and would not open and shut as it should. One knee was slightly cut and bruised, and his lower back ached. He was confined in the hospital 15 days, after which he returned to his home in Auburn. There he remained bedfast for several weeks, and was treated by a local physician for several months. Although plaintiff had an unsightly disfigurement and the foregoing disabilities, it was thought that he was slowly convalescing and would be back at work in a few weeks. However, adhesions closed his ear canals,

causing them to become infected for want of drainage, and almost destroyed his hearing. In addition, his original symptoms were aggravated by fatigue, nervousness, and insomnia, and at time of trial he had not yet attempted to obtain employment, although it appears that prior thereto he was physically able to have been employed part time.

On August 19, 1946, defendant's insurance carrier sent plaintiff to a physician in St. Joseph, Missouri, who found some of such symptoms, and advised plastic surgical restoration of plaintiff's ear canals. Thereafter, in December 1946 and in January and February 1947, three more of defendant carrier's physicians and surgeons from Kansas City and Omaha made like recommendations, but nothing was done about it until between April 4 and April 19, 1947. During that period he was taken to a hospital where a plastic surgeon performed an operation on plaintiff's left ear with favorable results. Thereafter, on April 23, and again on May 17, 1947, physicians employed by defendant's carrier examined plaintiff and re-examined his left ear, whereat they reported that plaintiff should return to work on June 1, 1947. He complained that he was unable to do so, however, and between January 16 and January 24, 1948, plaintiff was again placed in a hospital by defendant's carrier where plastic surgery was performed upon his right ear with favorable results. Two days thereafter his compensation was stopped.

In March 1948 plaintiff employed two physicians of his own, who, after examination and treatment, were of the opinion that plaintiff had suffered a brain injury with resulting traumatic encephalitis and post-traumatic neurosis, which at time of trial they were of the opinion had caused plaintiff to suffer a 60 to 75 percent permanent partial disability. They testified, however, that plaintiff had improved and further medical treatment would not be curative but only palliative, by the administration of heat and prescription of vitamins. There

is no medical evidence which could sustain a finding of total permanent disability.

In that connection, the Mayo Clinic examined plaintiff and on April 12, 1950, among other things, reported that he had: "a traumatic neurosis with a major symptom of mild depression associated with insomnia * * * and suggested psychiatric aid if his nervous symptoms showed no sign of amelioration." It should be noted, however, that they found other disabilities which were not caused or aggravated by the accident.

In the meantime, defendant carrier had plaintiff examined by several physicians and neurologists, one of whom diagnosed plaintiff's disability as "post traumatic neurosis," with possibility of some organic brain damage, despite the fact that recognized medical tests negatived that conclusion. Others reported no objective symptoms of disability by X-ray or otherwise, except plaintiff's ears, and one adhered to his testimony that plaintiff had no disability except his ears, which were recovered by June 1, 1947, when plaintiff was allegedly able to return to work, despite the fact that a plastic operation was performed with his knowledge and upon his recommendations as late as January 1948.

We are not unmindful that the trial court observed plaintiff, as well as some of the physicians and other witnesses who testified during the trial, whose testimony was in irreconcilable conflict on material questions of fact. Therefore, after an examination of all the evidence, including that given by at least 12 physicians and surgeons in addition to a report from the Mayo Clinic, we conclude, as the trial court did, that plaintiff was not totally and permanently disabled, but did sustain a 75 percent temporary partial disability in addition to the 105 weeks of temporary total disability and 17½ weeks for loss of plaintiff's ears.

In that connection the law in force at the time of the accident, section 48-121, R. S. Supp., 1945, as applicable here, provided in part: "For disability partial in

character, except the particular cases mentioned in subdivision (3) of this section (applicable for loss of plaintiff's ears), the compensation shall be sixty-six and two-thirds per cent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but such compensation shall not be more than eighteen dollars per week. This compensation shall be paid during the period of such partial disability; not, however, beyond three hundred weeks after the date of the accident causing disability. Should total disability be followed by partial disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability."

The wages received by plaintiff were $35.80 a week. With a 75 percent temporary partial disability, plaintiff's earning power would be 25 percent of $35.80, or $8.95 a week, which, subtracted from $35.80, leaves a difference of $26.85. As a result, 66⅔ percent of such difference would be $17.90, the proper weekly rate which plaintiff was entitled to receive for a period of 175 weeks for temporary partial disability. In other words, plaintiff was entitled to recover for 105 weeks temporary total disability at $18 a week, plus 175 weeks at $17.90, instead of $13.50 a week, for 75 percent temporary partial disability, plus 17½ weeks at $18 a week for 50 percent loss of his left ear and 20 percent loss of his right ear.

At the hearing on December 19, 1950, the plaintiff was admittedly improved and no necessity for further surgical or psychiatric treatment was shown. In Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N. W. 2d 11, this court held: "Where the evidence discloses that further medical, hospital, and surgical services would not definitely improve the condition of an injured employee, and where such improvement would be conjectural, the employer's liability under section 48-120,

R. S. 1943, to furnish reasonable medical and hospital services and medicines, as and when needed, ceases." Therefore, in the light of the evidence and such rules, we conclude that defendant should not be required to furnish plaintiff any future medical and hospital services. The trial court correctly refused to enter such an order.

On the other hand, defendant was given credit for payment of certain medical and hospital bills, was required to pay certain of such bills then unpaid, and was required to reimburse plaintiff for certain such bills paid by him. In addition thereto, we conclude that the trial court should also have required defendant to reimburse plaintiff for an additional $278.48, composed of the following items: $43.48 for medicine purchased and paid for at Cline's Drug Store; $18 for medicine purchased and paid for at Witt Drug Store; and $217 paid by plaintiff for medical services at Mayo Clinic, Rochester, Minnesota.

In that connection, plaintiff contended that the trial court erred in directing defendant to pay one of his physicians only $478. Such contention has no merit. An examination of the claim discloses that $200 thereof was for witness fees at $100 a day. In that connection, the rule is: " 'One testifying as an expert on a subject requiring special knowledge and skill, in the absence of a special contract, is entitled only to the statutory fee.' Main v. Sherman County, 74 Neb. 155." Ulaski v. Morris & Co., 106 Neb. 782, 184 N. W. 946.

In its decree the trial court ordered defendant to reimburse plaintiff in the amount of $350 for necessary expenses in traveling to and from his home for medical treatment. We conclude that such amount should have been for a total of $831.85, as contended by plaintiff.

For the reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed in part, and reversed in part, and the cause is remanded with directions to enter a judgment for

plaintiff in conformity with this opinion. Costs are taxed to defendant.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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STATE EX REL. CHARLES E. WEINBERGER, APPELLANT, V. JAMES T. GORMLEY ET AL., APPELLEES.
51 N. W. 2d 343

Filed February 1, 1952. No. 33083.

1. **Mandamus.** A finding of fact in a mandamus proceeding will not be disturbed on appeal unless it is clearly wrong.
2. **Highways.** To establish a highway by prescription there must be a user by the general public under a claim of right, adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of ten years.
3. **Mandamus: Highways.** The establishment of highways, the building of bridges, or the making of local improvements, is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course.

APPEAL from the district court for Greeley County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

*M. J. Buckley,* and *Wagner & Wagner,* for appellant.

*Lanigan & Ondracek,* and *P. J. Barrett,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellant sought a writ of mandamus to require the county commissioners of Greeley County, appellees, to construct a suitable bridge as a part of an alleged section line public highway of that county at the location where it is intersected by Mud Creek, and to put the highway in an appropriate condition for travel by the general public.

The basis of the relief asked, as stated by appellant, was that: He was the owner of the northwest quarter and the northeast quarter of the northeast quarter of Section 24, Township 20 North, Range 9 West of the 6th P. M., Greeley County. A public highway had been established on and along the section line between Section 24 and Section 13 by proceedings had by the county and by user. A watercourse or draw extended across the highway near the northeast corner of the northwest quarter of Section 24, over which the county constructed and maintained a bridge. About 1941 the bridge was destroyed by floodwaters passing down the watercourse. There has been no bridge there since, but one had been requested by appellant and refused by appellees. There had been considerable travel of the highway before the loss of the bridge, and persons living east and west of the highway between these sections suffered inconvenience and the value of their real estate had been reduced because of their inability to travel the highway. The land of appellant was farmed as a unit. The farmstead was on the northwest quarter of Section 24, west of the watercourse, and near the north line. The 40-acre tract was east thereof. The schoolhouse available to persons living on the land of appellant was near the southeast corner of Section 24. The absence of a bridge across the watercourse prevented direct travel between the two tracts of land of appellant, increased the cost of the farming operations, and lengthened the distance necessarily traveled between the farmstead and the schoolhouse by a distance of one mile.

The answer of appellees to the petition of appellant and the alternative writ of mandamus was an admission that appellant owned the parts of Section 24 as he alleged, and that appellees were the county commissioners of Greeley County; a denial of all other statements therein, and allegations that no highway was ever established by the county between Sections 13 and 24 or by user or prescription; that there were highways estab-

lished and properly maintained along the west, south, and east of the lands of appellant; that there was an adequate way of travel to and from the buildings on the land to the north and south of the section line between the sections in question; that there is neither need nor demand for a road between the sections; that the cost and expense of constructing and maintaining such a road would be disproportionate to any purpose served by it and would be an unwarranted expenditure of public funds; and that the county commissioners were clothed with and were required to exercise discretion in the matter of improving and maintaining a road for the county or building a bridge as a part thereof.

The substance of the reply was a denial of the new matter contained in the answer.

The trial of the case eventuated in a finding generally for appellees and against appellant, and a judgment of dismissal. The motion for a new trial was denied and this appeal resulted.

The trial court resolved the issues of the case and all conflicts in the competent evidence favorable to appellees. This court may not disturb any finding of fact made by the district court that is sustained by evidence. It has long been considered in this jurisdiction that: "Findings of fact in a mandamus proceeding, based on conflicting evidence, will not be disturbed on appeal unless clearly wrong." State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26.

There is no attempt to prove that the county instituted or conducted any proceedings to establish or open a highway between the sections of land referred to in this case. It is conceded that appellant relies upon the establishment of a highway at the location in question by user. The appellant to maintain the position adopted by him had the burden of showing a continuous adverse user by the public of the location in question for a period equal to that required to bar an action for recovery of title to land, and that the use by the public

was under a claim of right manifested by some appropriate action on the part of the public authorities. In Gehris v. Fuhrman, 68 Neb. 325, 94 N. W. 133, it is said: "To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land. of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action for the recovery of the land." See, also, Hill v. McGinnis, 64 Neb. 187, 89 N. W. 783; State ex rel. Draper v. Freese, 147 Neb. 147, 22 N. W. 2d 556.

There is evidence that in 1918 there was a bridge across Mud Creek where it intersected the section line between Sections 13 and 24, Township 20, Range 9, Greeley County; that there were tracks indicating that some travel had passed along the area near the section line but no evidence that any grading or any other thing had been done to designate or improve it as a highway. It was not shown who constructed the bridge. There was no bridge at this location from 1920 for a period of at least ten years, and there was no general use of the area for travel along or near the section line from 1920 to 1944. There was not much travel on or near the section line except during pheasant hunting. In the period from 1930 to 1934, a bridge and a culvert were put in for crossing Mud Creek. They were each washed out by the water passing down the creek. There was no proof that the county authorized the construction of either of them. The last bridge at that location was destroyed by floodwaters in 1935. There was no defined, graded, or improved road on or along the section line except from the west to the driveway into the farmstead on the northwest quarter of Section 24. A road grader of the county was used on or near the section line from Mud Creek east to the northeast corner of the northwest quarter of Section 24 in 1946 at the direction of James T. Gormley. This was done at the request of and as an accommodation for appellant, and not

because there was a county road there. Gormley instructed the operator to make two rounds with the grader. There is no showing that the county knew, authorized, or ratified what Gormley did in this regard. There was no need or general demand for a highway between the sections or for a bridge as a part of the highway. No one was demanding a road or a bridge but appellant. The county board, when request for a bridge across Mud Creek at the section line was received by it, made an inspection and investigation and determined there was no reason for a bridge or road between the sections in question; that to construct a bridge there would be a waste of tax money; and that for a bridge at that location to be useful would require grading, fills, and "culverts would have to be installed" to the east thereof to the northeast corner of Section 24, a distance of about three-quarters of a mile. The county board determined that there was no public need or demand for either a bridge or a road at that location.

The conclusion of the district court was right. There is substantial evidence that there was not a user by the general public under claim of right adverse to the occupancy of the owner of the land of some particular or defined way or track uninterruptedly for a period of ten years, and that the county board properly exercised the discretion vested in it in reference to the matters involved.

The judgment of the district court should be, and it is, affirmed.

AFFIRMED.

# I. N. MORGAN, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

51 N. W. 2d 382

Filed February 1, 1952. No. 33091.

1. **Health: Physicians and Surgeons.** Osteopathy may, in general terms, be defined as the treatment of human ills by means of manipulative therapy as distinguished from the treatment of such ills through the use of drugs and operative surgery by physicians and surgeons.
2. **Constitutional Law: Health.** The practice of osteopathy is recognized by law as a lawful occupation in the public interest. It may not be arbitrarily limited or discriminated against, and its advocates may lawfully operate property and facilities for the treatment, according to its tenets, of patients seeking its aid, subject only to reasonable regulations under the police power relating to the public health and welfare.
3. **Health: Physicians and Surgeons.** A licensed osteopath in this state is authorized to practice osteopathy in all of its branches as taught in osteopathic colleges recognized by the American Osteopathic Association; to perform surgery as it is taught and used as a part of the osteopathic system, but not including operative surgery with surgical instruments; and to practice obstetrics and use anesthetics.
4. **Hospitals: Constitutional Law.** A regulation adopted by the Department of Health that all persons admitted to a licensed hospital must be under the care of a person licensed to practice medicine and surgery in Nebraska has no relation to health or public welfare, is unreasonable, discriminatory and capricious, is an unlawful exercise of the police power, and is invalid.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Reversed and remanded with directions.*

*Denney & Denney,* and *Perry & Perry,* for appellant.

*Clarence S. Beck,* Attorney General, *Walter E. Nolte,* and *Homer L. Kyle,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellant, an osteopathic physician and surgeon, made

application for a license to operate a hospital owned by him in Steele City, Nebraska, as an incident to and in connection with his practice of osteopathy. The Director of Health held a hearing and denied the application for the single reason that the hospital of appellant did not satisfy the standard of the Department of Health of the State of Nebraska that any person admitted to a licensed hospital must be under the care of a person licensed to practice medicine and surgery in Nebraska. An appeal was prosecuted by appellant to the district court for Lancaster County, trial was had, a finding made that the hospital of the applicant "does not comply with the state law and the standards and requirements for operation of a hospital," and a judgment was entered dismissing the application.

There is no issue of fact in this case. Appellant is and has been since 1931 a licensed and practicing osteopathic physician and surgeon of Nebraska. He owned, maintained, and operated a hospital in Steele City from 1935 until 1948 as an incident of and in connection with his practice of osteopathy. He applied for a license to operate his hospital for the year 1948, and a license therefor was granted and issued to him. His application for a license to operate the hospital for the year 1951 was denied, but he was granted and issued a license to operate a maternity home or hospital during that year.

Appellant has at all times limited his practice and services to the things he is authorized and licensed to do as an osteopath. The fact he operated a hospital until the license to do so was denied him did not in any way affect the scope or field of his practice. He conducted himself properly and ethically as an osteopath strictly within the authority and limitations of his license. Any person at or who came to the hospital and required or desired the services of a regular physician and surgeon was furnished or permitted to have one. There has never been any person licensed to practice

medicine and surgery in Nebraska interested in or connected with the hospital of appellant or who has had charge of anyone who was admitted to it as a patient of appellant.

The Legislature of 1947 adopted an act relating to licensing, inspecting, and regulating hospitals. Laws 1947, c. 231, p. 727; §§ 71-2017 to 71-2030, R. R. S. 1943. The declared purpose was to establish and enforce basic standards for the care of persons in institutions which rendered nursing care and to provide for and insure safe and adequate care of persons in such institutions. It made it unlawful after January 1, 1948, for anyone to maintain and operate facilities for the care of two or more nonrelated persons suffering from illness, injury, or deformity, or where obstetrical or other care was rendered for a period of more than one day, without obtaining a license to do so as provided by the act.

The Department of Health was required to issue licenses for the operation of institutions subject to the act which were found to comply therewith and with "such regulations as are lawfully promulgated by said department." It was required to deny or revoke any license issued for violation of the act or any rules and regulations lawfully promulgated pursuant to it; for permitting, aiding, or abetting the commission of any unlawful act; or for: "Conduct or practices detrimental to the health or safety of patients and employees of said institution; Provided, that this provision shall not be construed to have any reference to healing practices authorized by law." § 71-2023, R. R. S. 1943.

The Department of Health, with the advice of the Hospital Advisory Council created by the act, was required to adopt, promulgate, and enforce standards for different types of hospitals and related institutions to be licensed, and was empowered to modify, amend, and rescind any standard adopted. The Department of Health acted, and in April 1950, adopted standards. Under the subhead of "Medical Attendance" in section VIII A 1,

of the standards adopted by the department, is the following: "All persons admitted to any institution covered by these standards must be under the care of a person licensed to practice medicine and surgery in Nebraska."

The appellant has not complied with and does not intend to satisfy the requirement of this standard. If it is valid and enforceable as construed by the Department of Health, the denial of the application of appellant was correct. Otherwise, it should have been granted and a license issued to him to operate a hospital as an incident of and in connection with his practice of osteopathy as a place to care for his patients who desired or required hospitalization.

The Department of Health, for administering the act referred to, has classified hospitals as "General Hospital" and "Specialized Hospital (i.e., orthopedic, contagious, etc.)." The standard quoted above is applicable to either class of hospitals recognized by the department. It requires any person admitted to either to be under the care of a person authorized to practice medicine and surgery in Nebraska. A duly licensed osteopath, under the rules promulgated by the Department of Health, cannot have and operate a hospital facility for the care of persons suffering from sickness, injury, or deformity who are legally and properly his patients. He may render osteopathic healing practices and services in his office or in their homes, or at any other place in Nebraska except in a hospital. For an osteopath to have a patient in a hospital in Nebraska, the Department of Health demands that the patient be cared for while there by a regularly licensed physician and surgeon. In fact, the literal terms of the standard are that at the very time a person is admitted to a hospital he must then be under the care of a regular physician and surgeon.

Appellant has been, during the time important to this case, authorized to practice osteopathy in all its branches as taught in recognized osteopathic colleges,

which "consists of a system of manipulation of the limbs and body of the patient * * * by kneading, rubbing or pressing upon the parts of the body without the aid of medicine or operative surgery"; to perform surgery as it is taught and used as a part of the osteopathic system of healing, which in the main is by manipulation and does not enter the general field of operative surgery with surgical instruments; and to practice obstetrics and use anesthetics. State ex rel. Johnson v. Wagner, 139 Neb. 471, 297 N. W. 906. Otherwise stated, the license of appellant as an osteopathic physician and surgeon authorized him to treat human ills by means of manipulative therapy as distinguished from the treatment of such ills through the use of drugs and surgery by regular physicians and surgeons.

Appellant performs professional services for persons who have suffered sprains, fractures, and injuries which do not require operative surgery; for persons afflicted with chronic heart disorders, rheumatism, and maternity cases; and persons with other ills and conditions that can properly be cared for by an osteopath. Many of his patients desire and require hospitalization. He is unable to secure a license to furnish it to them, except maternity cases. His patients cannot enter any other hospital unless they place themselves under the care of a regular physician and surgeon. The realistic view, therefore, is that an osteopath cannot have a patient in a Nebraska hospital unless the patient is a maternity case. He is thereby restricted and deprived of an advantage and right to which he is entitled by and as an incident of the authority granted to him by the state to practice osteopathy. The standard adopted by the Department of Health is unreasonable and capricious, is an unreasonable exercise of the police power, and violates constitutional prohibitions. It has no real and substantial relation to public health or any other subject important to public welfare. The requirement of the standard bears no relation to the sanitary conditions

or the adequacy of the equipment of the hospital; no relation to the training, competence, or qualification of the personnel, or to the manner of the operation of the physical plant of the hospital; and no relation to the public health, morals, welfare, or security. It may not be asserted that the ability of an osteopath is affected by the fact that his patient is or is not admitted to and cared for in a hospital, or that the quality of the care furnished his patient would be improved by interference of a physician and surgeon while the care was being furnished.

Appellees refer to decisions sustaining regulations prohibiting osteopathic physicians and surgeons from practicing in hospitals. Cases of this character, and they are numerous, verify the extent and frequency of the exclusion of osteopaths from the use of hospitals owned and operated by others, including municipalities and public corporations. If the osteopath may be also excluded by rule such as the one here involved, from having and using a hospital owned by him for the care of his patients, the restriction becomes complete prohibition. These cases also indicate the serious character of the lack of harmony and agreement between the regulars and the osteopaths concerning healing practices, and the practical impossibility of any patient of an osteopath being admitted to a hospital if he is required to place himself under the care of a physician and surgeon as a condition of his admittance.

Any standard adopted by the Department of Health must meet constitutional requirements, must not be oppressive, arbitrary, or discriminatory, nor disregard substantial property rights. The practice of osteopathy is recognized and authorized by law. §§ 71-1,137 to 71-1,141, R. R. S. 1943. It is constituted a lawful occupation in the public interest, and as such is entitled to protection against unlawful restrictions and interference. It may not be arbitrarily limited or discriminated against, and its advocates may lawfully erect and operate build-

ings and facilities for the treatment, according to its tenets, of patients seeking its aid, subject to lawful and reasonable limitations and regulations under the police power. The limitations and regulations imposed must bear relation to the public health or welfare. The practice of appellant as an osteopath is his business, it is a property right, and as such entitled to protection against unlawful restrictions and interference. A state, or an agency of it, may not, under the guise of protecting the public, arbitrarily interfere with private business, prohibit lawful occupations, or impose unreasonable or unnecessary restrictions upon them. To grant appellant the authority to practice osteopathy and then deny him the right to have the use of a recognized and useful facility for the care of his patients, except upon condition that he surrender the care of them to a physician and surgeon, is to take away much of the value and importance of the grant made. Spears Hospital v. State Board, 122 Colo. 147, 220 P. 2d 872; Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. Ed. 204, 49 S. Ct. 57; Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205, 8 S. Ct. 273; San Diego T. Assn. v. East San Diego, 186 Cal. 252, 200 P. 393, 17 A. L. R. 513; Ex parte Whitwell, 98 Cal. 73, 32 P. 870, 35 Am. S. R. 152, 19 L. R. A. 727. See, also, Blackledge v. Farmers Independent Telephone Co., 105 Neb. 713, 181 N. W. 709, 16 A. L. R. 343.

The solution of the problem of this case suggested by appellees is their claim that the standard provides only that a licenced physician and surgeon "be on the staff of every licensed general hospital" and that the regulation does not prevent any osteopath from practicing in a general licensed hospital. The plain, unmistakable language of the standard is that all persons admitted to any hospital subject to the standard must be under the care of a person licensed to practice medicine and surgery in Nebraska. It contains not a word about anyone being "on the staff" of any hospital. Lan-

guage of such obvious and conclusive meaning needs no argument and will admit of no interpretation. An osteopath may have a patient in a licensed hospital, but if he does, the patient must be under the care, not of an osteopath, but "of a person licensed to practice medicine and surgery in Nebraska." This substantially prohibits an osteopath from having a patient in such a hospital.

Appellees also assert that the object and purpose of the standard is that "every general hospital should be staffed and equipped to meet any and every emergency * * *." If this is the correct appraisal of the standard in question, it could be fairly maintained, especially by the advocates of the merits of osteopathy, that every licensed hospital must have an osteopathic physician and surgeon on its staff. The hospital of appellant complied with every requirement for the license sought. It was refused solely because of the failure of the patients admitted to be cared for by a physician and surgeon. In other words, the application was refused because the patients admitted to the hospital of appellant were his patients and were cared for by him, and he was an osteopath. This standard is completely silent on the subject of how a hospital shall be staffed. It does not require that anyone authorized to practice any system of the healing art shall be on the staff of a hospital licensed by the department. This contention is wholly without substance or merit.

The record wholly fails to show any reason why the application of appellant should not have been granted and a license issued to him to operate his hospital.

The judgment should be, and it is reversed and this cause is remanded to the district court for Lancaster County, with directions to render a judgment directing and requiring the appellees, on application of appellant, to grant and issue to him a license to maintain and operate the hospital owned by him in Steele City, Nebraska, as it was maintained and operated by him at the time

the application for a hospital license was made which is involved in this case, and that all costs herein be taxed to appellees.

REVERSED AND REMANDED WITH DIRECTIONS.

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PERCY LUNG ET AL., APPELLEES, V. HARRY FRANDSEN ET AL., APPELLANTS.
51 N. W. 2d 255

Filed February 1, 1952. No. 33109.

1. **Habeas Corpus.** In general, the writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice.
2. **Parent and Child.** Parents have a natural right to the custody of their children unless they are affirmatively shown to be unfit.
3. ———. The courts may not properly deprive the parents of the custody of their children unless it be shown that such parents are unfit to perform the duties imposed by the relation or that they have forfeited that right.

APPEAL from the district court for Kearney County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

*William H. Meier*, for appellants.

*Bracken & Tucker*, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is a habeas corpus action originally commenced in the county court of Kearney County by Percy Lung and Carrie Lung against Harry Frandsen and Grace Frandsen for the purpose of obtaining the custody of Gloria Dee Lung, minor daughter of the Lungs. The county court, after hearing, denied the Lungs custody of their child. The Lungs then appealed to the district court for Kearney County. The district court, after

trial, directed that the custody of the child be delivered to the Lungs. From this decree, their motion for new trial having been overruled, the Frandsens appealed to this court.

Of this class of actions, we have said: " 'In general, the writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice.' 39 C. J. S., Habeas Corpus, § 41, p. 568." Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388. See, also, In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161.

Section 38-107, R. S. 1943, provides, insofar as here material, that: "The father and mother are the natural guardians of their minor children and are equally entitled to their custody, * * * being themselves competent to transact their own business and not otherwise unsuitable."

The principles applicable to the question herein involved, which is one of fact, are as follows:

"Parents have a natural right to the custody of their children unless they are affirmatively shown to be unfit. See Voboril v. Voboril, 115 Neb. 615, 214 N. W. 254." Hanson v. Hanson, *supra*.

"The courts may not properly deprive the parents of the custody of their children unless it be shown that such parents are unfit to perform the duties imposed by the relation or that they have forfeited that right." Boucher v. Dittmer, 151 Neb. 580, 38 N. W. 2d 401.

What this court said in Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. S. R. 500, is as applicable today as it was then. Therein this court said: "We are aware that this court has several times asserted that in such controversies as the present the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the

custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided."

In Norval v. Zinsmaster, *supra*, the court goes on to say: "The right of the parent is not lightly to be set aside, and it should not be done where unfitness is not affirmatively shown, or a forfeiture clearly established." See, also, Terry v. Johnson, 73 Neb. 653, 103 N. W. 319; State ex rel. Britton v. Bryant, 95 Neb. 129, 145 N. W. 266.

The trial was held on June 12 and 13, 1951, and the data, such as ages of the parties, etc., will be with reference thereto unless otherwise shown in the opinion.

Percy Lung and Carrie Lung are husband and wife, being respectively 63 and 46 years of age. Their family consists of themselves and six children. The children are a daughter Charlotte, age 23 years; a son Percy, Jr., age 19 or 20 years; a son Harry, age 13 years; a son Paul, age 8 years; a son James, age 6 years; and a daughter Gloria Dee, age 2 years. Gloria was born on February 10, 1949.

During the time herein involved the family either lived in a tenant house located on the farm of Fay Rogers near Minden in Kearney County, Nebraska, where Mr. Lung worked as a hired man for Roy Francisco, who operated it, or in the farm home on a farm in Jewell County, Kansas, where he worked as a hired man for W. H. Hutt. The latter farm is located about two miles south and a quarter mile east of Superior, Nebraska. Just when the Lungs moved to the latter farm is not too clearly shown by the record but apparently it was sometime in April 1951.

The tenant house occupied by the Lungs on the farm near Minden is a small one-story building having four rooms, each about 10 ft. by 12 ft. Two of these rooms were used as bedrooms, one as a living room, and the other as a kitchen. It has no closets or storage space. The house is not modern and it was necessary to carry water about a block and a half. It is apparent that the conditions under which they lived in this home presented difficulties not common to a modern home and required a good deal of extra work. Naturally the standards of good housekeeping are affected by the facilities available in the home.

After Gloria was born the Lung family suffered an epidemic of sickness. Just what caused this cannot be positively stated. It may have been due to a poorly ventilated home, poor heating conditions, or many other causes. During this epidemic Gloria had measles and whooping cough, and Mrs. Lung suffered from a severe leg infection and gall bladder trouble. The mother's condition affected her ability to take care of the home and her family and, because thereof, the conditions existing in the home during the year 1949 left much to be desired.

It was finally decided that Mrs. Lung should go to a hospital for surgery to correct her gall bladder condition. It was thought best, by those in charge from the county assistance office, to temporarily take the three youngest children out of the home while the mother would be away. This Mrs. Lung agreed to. As a result, such arrangements were made by the county assistance officer. The two younger boys, James and Paul, were, on January 4, 1950, taken to a children's home in Holdrege, Nebraska, and the baby, Gloria, was on the same day taken to the home of Harry and Grace Frandsen. The Frandsens are a farm couple who live on a farm some six or seven miles from Minden. The older boy was left at home and stayed with the father.

When Gloria was taken to the Frandsen home she

was in very poor physical condition and possibly in poor health. Just what this was due to cannot be positively stated. It may have been due to the sicknesses which she had had, it may have been due to her nursing while her mother was sick, it may have been due to lack of care and food resulting from her mother's inability to properly take care of the family during the time she was sick, or it may have been due to a combination of all three.

The mother went to the hospital and came through the operation successfully. However, the length of time required for her recovery was longer than had been anticipated. At the time Gloria was taken to the Frandsen home it had been arranged to leave her there about two months. However, when the doctor in charge of Mrs. Lung would not let her return home unless it was understood she was not to have the care of the children for six months, this time was extended accordingly. James and Paul returned home either in the latter part of July or forepart of August 1950. When request was made in August 1950 for Gloria's return the Frandsens would not comply therewith and she has never been returned to her parents.

After Mrs. Lung returned from the hospital her condition improved and the general condition of the home improved. This is also true of the house they now occupy in Kansas which is a seven-room home with both water and electricity available.

Mr. Lung, while working in a field of labor that does not pay the highest wages, is a man of good habits and a steady worker fully capable of holding a job in his line of work. He uses his income to support his family. Mrs. Lung is devoted to her family. There is nothing in the record that disqualifies either of them from having and raising their own children, except the fact that they are in a low income bracket and consequently have not always had available all the facilities we commonly associate with a modern home.

We do not, in any way, want to reflect on the Frandsens and their home. They appear to be people of the finest type who have and would give Gloria a good home. The record shows Gloria quickly responded to the treatment she received when she entered their home and she now appears to be happy there. But these facts are not here controlling as to the rights of the Lungs.

Without going into further detail we have come to the conclusion that the record does not show the Lungs to be unfit to perform the duties imposed upon them as parents. In this respect we have not overlooked the difficulties of Charlotte's husband nor the difficulties of Percy, Jr., which ultimately caused him to be sent to the men's reformatory. These are unfortunate incidents in the lives of these two young people. While the record of Percy, Jr., does reflect somewhat on the parents, we do not find it of such character that it should take from the Lungs the right to have and raise their other children, including Gloria.

It is significant to note that at no time did those in charge of the county assistance office of Kearney County take any action to permanently remove any of the four younger Lung children from the custody of their parents. The evidence shows the three boys (Harry, Paul, and James) are and have at all times been well taken care of by their parents, considering all the circumstances affecting the Lung household at the time.

We have come to the conclusion that since the Lungs have done nothing to forfeit their right to their daughter and since the evidence fails to show them unfit to be parents, that the custody of their daughter should be given to them and that Gloria should be returned by the Frandsens to the Lungs. We therefore affirm the decree of the trial court to that effect.

AFFIRMED.

JOHN F. YOUNG, JR., PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
51 N. W. 2d 326

Filed February 1, 1952. No. 33114.

1. **Indictments and Informations: Criminal Law.** Where an information is filed under section 29-2219, R. R. S. 1943, charging a violation of an order of probation, compliance with the provisions of section 29-1602, R. R. S. 1943, regarding the endorsing of the names of witnesses on an information, is not mandatory and the failure to do so is not error.
2. **Criminal Law.** It is entirely proper for the court, where probation violation is established, to inquire into the matters covered by sections 29-2217 and 29-2218, R. R. S. 1943, in determining whether or not the probation order should be vacated and the penalty of the law imposed.
3. ———. It is not error, in the absence of a showing that defendant was prejudiced thereby, to sentence a defendant after verdict and before a motion for a new trial has been filed.
4. ———. Sections 29-2201 and 29-2202, R. R. S. 1943, do not require that the court defer judgment until the statutory time for filing a motion for a new trial has expired.
5. ———. Where the violation of a probation order is established or admitted, in determining whether or not to set aside the probationary order and to impose the penalty which it might have imposed before placing the defendant on probation, the trial court is not limited to a consideration of probative evidence of matters arising subsequent to the order of probation.
6. ———. Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

ERROR to the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

*Albert Pike II*, and *Perry & Perry*, for plaintiff in error.

*Clarence S. Beck*, Attorney General, and *Clarence A. H. Meyer*, for defendant in error.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an appeal from a judgment finding that plaintiff in error had violated the conditions of an order of probation, vacating said order, and sentencing plaintiff in error to imprisonment in the reformatory for a period of not less than 18 months or more than 2 years. We affirm the judgment of the trial court.

Hereinafter the plaintiff in error will be referred to as the defendant.

The following statement is summarized from the transcript. On October 9, 1950, an information was filed in the district court charging the defendant with feloniously breaking and entering a motor vehicle with intent to steal property of value contained therein. On October 19, 1950, defendant appeared with counsel, was arraigned and pleaded guilty, and judgment of guilt was entered. A plea for probation was made and granted. The defendant was placed on probation for a period of two years under the supervision of the sheriff of Thayer County. One of the conditions of the order was that "The defendant shall not violate any federal, state or local laws whatsoever." The court further ordered that the suspension of the proceedings would be terminated by any violation of the terms of probation and that upon termination the court retained power to pronounce sentence. The defendant acknowledged in writing receipt of a copy of the order of probation, stating that he understood and promised to observe the conditions. On June 23, 1951, the county attorney, by information, charged that on June 6, 1951, defendant was found in an unlawful state of intoxication; that on June 7, 1951, in the county court of Thayer County, defendant was charged with unlawful intoxication, pleaded guilty, and was fined in the amount of $20 and costs; that the above described acts were a direct violation of the order of probation; and that the order should be revoked and the defendant sentenced on the charge contained in the original information. On June 25, 1951, a certified copy of the in-

formation was served on the defendant. On July 3, 1951, the defendant appeared with counsel, was arraigned on the information, stood mute, and a plea denying the truth of the charges was entered by the court and the cause was continued to July 12, 1951. On July 12, 1951, the matter came on for hearing, the defendant being represented by counsel. Evidence was taken and the cause submitted. The court found that the defendant had violated the order of probation as charged and that in its opinion the defendant would not refrain from engaging in and committing further criminal acts in the future. The court also found that the order of probation should be set aside and the suspension of proceedings terminated, and that sentence should be passed on the breaking and entering charge. The court vacated the order of probation. The defendant was asked if he had anything to say as to why sentence should not be entered and responded, and the court found that he showed no good cause. The court thereupon entered sentence as above stated and ordered commitment. On July 21, 1951, the defendant filed a motion for a new trial setting up substantially the grounds here assigned as error. On August 10, 1951, the motion was overruled.

Defendant brings the matter here by petition in error.

As to the violation of the order of probation, the State offered evidence at the hearing that complaint was made and that defendant was found in a state of intoxication at Byron just before midnight, June 6, 1951, and that he was arrested, taken to Hebron, and placed in jail. The State offered evidence as to the charge, plea of guilty, judgment, and fine. Defendant testified that he was 20 years of age at the time of the hearing; that he had attended a public dance on the evening in question, had drunk beer and liquor with some others, and, in effect, admitted that he was intoxicated. He further admitted the charge, the plea, the finding of guilt, the fine, and its payment.

The hearing was conducted without objections to wit-

nesses called or to questions asked by the State, the defendant, or the court. The answers given were not challenged.

The assignments here considered were presented to the trial court when the motion for a new trial was filed.

The first assignment of error is that the names of the witnesses for the State were not endorsed upon the information or upon the copy served on the defendant. This is based upon the provisions of section 29-1602, R. R. S. 1943, which provides: "All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant. He shall subscribe his name thereto and endorse thereon the names of the witnesses known to him at the time of filing the same; and at such time thereafter, as the court or a judge thereof in vacation, in its or his discretion, may prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him."

It does not appear that objection was made to the testimony of any witness for the State on this or any other ground. After the State had rested, the defendant offered in evidence the information charging the probation violation. It was received and then the defendant called the court's attention to the fact that the names of witnesses were not endorsed on the information. The court was not asked to do anything with reference to it. The objection was first raised in the motion for a new trial.

The defendant appears to rest his assignment on the premise that the statute applies to an information of the character here involved. The State resists this assignment on the grounds of waiver and no prejudicial error shown.

In Sellers v. State, 105 Neb. 748, 181 N. W. 862, the violation of a probationary condition was presented by motion to revoke. That procedure was challenged. We

held: "A formal information and an arraignment conforming to criminal procedure were unnecessary. On the motion charging that defendant violated the probationary conditions of his parole, he had timely notice of a hearing, the assistance of counsel, the testimony of witnesses, and a fair and impartial trial. * * * While the proper practice requires a verified information stating specifically the conduct constituting a violation of probationary conditions, the course pursued in this case did not deprive defendant of any right protected by law." See, also, Moore v. State, 125 Neb. 565, 251 N. W. 117; Moyer v. State, 144 Neb. 673, 14 N. W. 2d 220; Carr v. State, 152 Neb. 248, 40 N. W. 2d 677.

Obviously, if a matter of this kind may be raised by motion without depriving a defendant of any rights protected by law, it of necessity follows that compliance with section 29-1602, R. R. S. 1943, is not mandatory as to an information charging a probation violation and the failure to endorse names of witnesses thereon is not error.

The second and third assignments are that the court erred in allowing proof of offenses other than that of the intoxication of June 6, 1951, and in revoking the suspension of sentence for conduct of defendant prior to the time of the suspension of the sentence.

The defendant relies on the provision of section 29-2219, R. R. S. 1943, that "* * * in case of violation of the probationary conditions, the court may impose any penalty which it might have imposed before placing the defendant on probation" and our holding in Moyer v. State, *supra,* that "* * * after the court has, within its discretion, granted probation such probation may not be revoked except upon a proper charge and probative evidence of violation."

These assignments are directed to the fact that the trial court inquired into the matter of three misdemeanors committed by the defendant prior to the offense committed in October 1950. Before the evidence

here involved was received, the State had offered evidence of the probation violation. The record shows that the defendant on cross-examination of the sheriff inquired as to these earlier offenses. The State then on direct examination inquired of the county judge as to these matters. The defendant then inquired on cross-examination as to dates. The court inquired into some of the details of the misdemeanors. All this was done without objection from anyone. The State meets these assignments with the contention that error, if any, was waived.

Section 29-2217, R. R. S. 1943, provides that in cases of criminal prosecution (with exceptions not here involved), where there is a finding or a plea of guilty, it shall be the duty of the court to ascertain if practicable the age of the accused, whether a first offense, the extent of moral turpitude involved, "and such other facts and circumstances relating to the accused as he may desire to know." In Roberts v. State, 110 Neb. 759, 195 N. W. 114, we held that what is now section 29-2217, R. R. S. 1943, made it the duty of the court to inquire into defendant's general conduct.

Section 29-2218, R. R. S. 1943, provides: "In case such judge, considering the age of the accused, his former course of life, disposition, habits and inclinations, or the fact that the offense of which he is found guilty is his first offense, or any other obtainable information, should be of the opinion that the accused would refrain from engaging in, or committing further criminal acts in the future, the court may, in its discretion, enter an order, without pronouncing sentence, suspending further proceedings and placing the accused on probation under the charge and supervision of a probation officer, or other suitable person."

It being the duty of the court to inquire into such matters initially, we hold it is entirely proper for the court, where probation violation is established, to inquire into the matters covered by sections 29-2217 and

29-2218, R. R. S. 1943, in determining whether or not the probation order should be vacated and the penalty of the law imposed.

The next two assignments are that the court erred in pronouncing sentence before defendant's motion for a new trial was filed and determined, and before the statutory time for filing had expired. In Stapleman v. State, 150 Neb. 460, 34 N. W. 2d 907, we held: "It is not reversible error, in the absence of a showing that the defendant was prejudiced thereby, to sentence a defendant after verdict and before the motion for a new trial has been overruled." We see no reason for a different rule where sentence is pronounced before the motion is filed. Prejudice is not shown. In fact, the procedure followed enabled the defendant to present to the trial court the contention that the sentence was excessive. Section 29-2201, R. R. S. 1943, provides: "Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be passed against him." Section 29-2202, R. R. S. 1943, provides: "If the defendant has nothing to say, or if he shows no good and sufficient cause why judgment should not be pronounced, the court shall proceed to pronounce judgment as provided by law." The journal entry here shows that the question was asked, and that defendant responded but showed no good cause. The court proceeded to pronounce judgment as provided by law. The statutes do not require that the court defer judgment until the statutory time for filing a motion for new trial has expired. We find no merit in these assignments.

The defendant's next three assignments of error go to the sufficiency of the evidence to show a violation of the parole and to warrant a revocation of the parole.

The evidence of the State shows, and defendant admits, the one violation of the terms of the probation order. It is contended that that was not willful and not legally sufficient to sustain the trial court's action. It should

also be said that inquiry was made at the hearing as to compliance with the other conditions of the probation order and noncompliance was not shown.

Defendant relies upon the rule first stated in Sellers v. State, *supra,* and quoted with approval in Moyer v. State, *supra,* and Carr v. State, *supra,* that "* * * any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of a parole." The net of defendant's contention is that the court in determining these matters cannot consider "probative evidence" of conduct prior to the entry of the probation order.

In the three cases above cited the evidence had to do with events occurring subsequent to the order of probation. Here the evidence as to intoxication relates to a matter subsequent, the other evidence is to matters prior, to the order of probation.

Rightly construed, the rule requires the trial court to determine two things. First—is there probative evidence "showing a violation of probationary conditions"? If not, then that disposes of the matter as we held in Moyer v. State, *supra.* See Wright v. State, 139 Neb. 684, 298 N. W. 685, where violation of a parole was established and we held: "After a violation of a parole, the defendant may be brought before the court and, after the violation be established, the court may impose any penalty which might have been imposed before placing the defendant on probation."

If there is a finding of a violation of the probationary order, then the second question arises—is there probative evidence "sufficient to convince the district court that defendant will not refrain from criminal acts in the future"? As the opinion in Sellers v. State, *supra,* clearly shows, this language relates to what is now section 29-2218, R. R. S. 1943, which provides that if the judge "should be of the opinion that the accused would

refrain from engaging in, or committing further criminal acts in the future," the court may place the accused on probation. By the statute it is a matter for the trial court's "discretion." In determining it initially, the trial court has broad powers of inquiry as to "facts," "circumstances," and "other obtainable information," as set out in sections 29-2217 and 29-2218, R. R. S. 1943. As to this, the second question, the court is confronted at that stage of the proceedings with the question, shall probation be continued? In determining that question the court has as broad powers as to probative evidence which is to be considered as it has in determining whether or not to exercise the power of probation in the first instance.

Accordingly we hold that where the violation of a probation order is established or admitted, in determining whether or not to set aside the probationary order and to impose the penalty which it might have imposed before placing the defendant on probation, the trial court is not limited to a consideration of probative evidence of matters arising subsequent to the order of probation. An abuse of discretion is not shown. We find no merit in these assignments.

Finally, the defendant contends that the sentence pronounced is excessive. Defendant invokes the provision of section 29-2308, R. R. S. 1943, that "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence."

The rule is: "Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion."

Bright v. State, 125 Neb. 817, 252 N. W. 386. See, also, Carr v. State, *supra*, and Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374.

There is no showing in this record of any of the facts or circumstances connected with the offense charged in October 1950. Consequently, as we said in Carr v. State, *supra*: "There is an absence of anything in the record of this case to suggest or support a conclusion of abuse of discretion by the court in fixing the punishment of defendant."

The judgment is affirmed.

AFFIRMED.

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MARGARET C. SMITH, APPELLEE, V. FRENCHMAN-CAMBRIDGE IRRIGATION DISTRICT, APPELLANT.
51 N. W. 2d 376

Filed February 1, 1952. No. 33119.

1. **Waters: Equity.** An original action in equity is an appropriate and permissible remedy to exclude or detach land unlawfully included in the area of an irrigation district created under the statute described in the opinion.
2. **Waters.** Land, provided with water by pump for its irrigation, may not be included in an irrigation district except upon written application or consent of the owner thereof.
3. ———. Whether or not land is provided with water by pump for its irrigation is a question which may be investigated and determined at any time in a proper case.
4. ———. If land is nonirrigable because of natural causes, it cannot lawfully be included or held in an irrigation district and taxed to support an irrigation system.
5. ———. Whether or not land, from some natural cause, cannot be irrigated is a question which may be put in issue and determined at any time in a proper case.
6. ———. Whether land cannot from any natural cause be irrigated within the meaning of section 46-176, R. S. 1943, must be determined from the facts in each case. No general and invariable rule to determine that fact can be stated.

APPEAL from the district court for Furnas County:

VICTOR WESTERMARK, JUDGE. *Judgment of the district court vacated. Judgment rendered in this court for appellee.*

*Frank B. Morrison,* for appellant.

*Charles E. McCarl,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an action in equity to exclude from appellant, an irrigation district, land owned by appellee, to cancel taxes levied upon it by appellant, and to enjoin it from future levy of taxes on the land. The district court awarded appellee the relief she sought and denied appellant a new trial. This appeal tests the validity of the decree.

Appellee and her husband, Sherman E. Smith, owned in joint tenancy the southwest quarter of Section 35, Township 4 North, Range 25 West of the 6th P. M., Furnas County. The part north of an irrigation lateral existing upon and across the land from about 1,045 feet south and a few feet east of the northwest corner thereof, following an irregular course, to the east line of the land a short distance south of the northeast corner thereof, consisting of about 95 acres, had been since 1938 until the time of the trial irrigated with water produced by a well and pump located on the land of a capacity in excess of 1,000 gallons a minute.

Sherman E. Smith signed a petition for the creation and organization of the Frenchman-Cambridge Irrigation District, and described in connection with his signature the "SW¼, Sec. 35, Twp. 4, Range 25, Acres 162, Excepts 95 acres now under pump irrigation." Appellee did not sign the petition for the organization and creation of appellant, or any request or consent that the land be included in the district. Her husband did not discuss with her his intention or decision to sign the

petition. He died in 1950, and appellee then became the owner in fee simple of the whole of the land involved in this case.

Appellant was established and declared a duly organized and created irrigation district under Chapter 46, R. S. 1943, by the board of county commissioners of Red Willow County on the 8th day of April 1946. The order of the board treated and included all of the land involved herein as a part of the area of appellant, and the district assessed the land of appellee and levied taxes thereon for irrigation purposes for each of the years 1948, 1949, and 1950. Appellee paid no part of the taxes levied by the district.

Appellee contends that authority and jurisdiction were lacking to include the part of her land irrigated by pump consisting of about 95 acres in the district because it was excepted and reserved by the declaration and act of Sherman E. Smith when he signed the petition to establish appellant, and for the reason that the statute under which appellant was created mandatorily exempted it from becoming a part of the district, except upon written application of its owners. Section 46-108, R. S. 1943, contains the provision that: "The person, * * * whose land, within any proposed district, is provided with water by pumping, * * * shall not be included therein except upon written application of the * * * owners of such land; Provided, that one thousand gallons per minute of water shall exempt one hundred and sixty acres, * * *."

The North Platte Irrigation & Land Company constructed a ditch to irrigate certain lands before the passage of the irrigation statute of 1889. Laws 1889, c. 68, p. 503. After the irrigation statute became effective, the company posted and filed the notice of appropriation required by it. Thereafter, when the irrigation law of 1895 (Laws 1895, c. 69, p. 244) took effect, the company filed a claim with the board of irrigation for the appropriation of water to irrigate the land served by the

ditch, and the appropriation of water therefor was allowed. Afterwards the Suburban Irrigation District was formed under the provisions of another act of the Legislature of 1895 (Laws 1895, c. 70, p. 269), and there was included in its boundary the land involved in the case later referred to and quoted herein. The district issued bonds and incurred obligations. It levied taxes on the land in the manner provided by law for the years 1896 to 1904, inclusive. It was practicable to irrigate the land from the ditch of the North Platte Irrigation & Land Company, and it had sufficient water and was willing to furnish it for that purpose at all times.

The act last referred to contained the provision: "* * * that where ditches or canals have been constructed before the passage of this act of sufficient capacity to water the land thereunder for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby shall be exempt from operations of this law * * * and that this law shall not be construed to in any way affect the rights of ditches already constructed." Laws 1895, c. 70, § 1, p. 269. State v. Several Parcels of Land, 80 Neb. 424, 114 N. W. 283, involved the validity of taxes levied by the Suburban Irrigation District on land under and served by the ditch of the North Platte Irrigation & Land Company. The taxes were held invalid on the basis that the land was exempt and could not be made a part of the Suburban Irrigation District because of the prohibition in the part of the statute last above quoted. Jurisdiction or authority to include it was lacking, and that objection was available at any time in a proper case. It is therein said: "The purpose of the district irrigation law was obviously to provide the means of reclaiming arid land for which up to that time water had not been available. It would have been clearly unjust for the legislature to permit these districts to be organized to include land already reclaimed, except in cases where the purpose of forming the dis-

trict was to purchase or take over an irrigation system already existing; * * *. We are therefore satisfied that his land should not have been included in the boundaries of the Suburban Irrigation District in the first instance. * * * 2. It is, however, contended that the county board had jurisdiction, and that its determination cannot be attacked in this proceeding. * * * A similar question, arising under the same statute, has once been before this court. Sections 47 to 54, inclusive, of the same act provide for proceedings by means of which land may be excluded from an irrigation district; and section 49 contains the proviso that in no case shall any land be held in any district or taxed for irrigation purposes which cannot, from any natural cause, be irrigated thereby. This clause was construed in Andrews v. Lillian Irrigation District, 66 Neb. 461. In this case it was alleged that the plaintiffs were the owners of certain lands lying within the boundaries of the irrigation district, which were low, wet, swampy lands and totally unfit for irrigation, and which needed to be drained before they could be farmed. * * * Considering the proviso in section 49 the court say: '* * * Whether a particular tract of land from some natural cause cannot be irrigated is a question which goes to the jurisdiction of the county board over such tract and may be raised at any time in a proper case, because section 49, supra, expressly denies the jurisdiction of the county board to include such land in an irrigation district, or to tax it for irrigation purposes.' The reasoning of this case applies to the question we are considering. If the provision that land which cannot, from any natural cause, be irrigated by a ditch excludes it from the jurisdiction of the county board, certainly the provision that land subject to be watered by a ditch constructed before the passage of the act and of sufficient capacity to water the same shall be exempt from the operation of the law would prevent the county board from passing upon and determining this question. * * * The exclusion in

section 1 is more radical and fundamental than that in section 49. It is that the lands described shall be exempt from the operation of the law; and it is only by the operation of the law that the county board can claim jurisdiction. Without this statute, from which this land is expressly made exempt, neither the county board which made the order, nor the district court which afterwards examined it, had any jurisdiction whatever. Their jurisdiction arose by operation of this statute. The defendant's land was expressly and by the plain and unequivocal language of the statute exempted from its operation. * * * 3. It is contended on behalf of the irrigation district that, if the lands of the defendant Walsh were wrongfully included in the district, he had a plain statutory remedy under sections 46 to 53, inclusive, of the act. We have already seen that under the rule in Andrews v. Lillian Irrigation District, supra, the express exclusion of authority negatives the jurisdiction of the county board." See, also, Sowerwine v. Central Irrigation District, 85 Neb. 687, 124 N. W. 118. The position of appellee on this phase of the case was properly sustained by the district court.

Appellee asserts that the part of her land south of the irrigation lateral, consisting of about 65 acres, was made a part of the district contrary to the facts and in violation of the law by virtue of which appellant was created and exists. The claim of absence of authority or jurisdiction to attach it to the area of the district is based on the allegation that this part of the land cannot from natural causes be irrigated.

There is no material dispute as to the character and condition of this part of the land of appellee. It is very rough and rolling land. It has innumerable slopes and grades and none that continue much over 150 feet in any direction. There are ditches, depressions, hills, and mounds. The topsoil is from two inches thick on the higher parts to two feet on the better parts of the land. If it were suitable for irrigation, it could be watered

by use of the pump on the farm. The subsoil is fine river sand down to shale. Five or six acres were leveled in 1943. It has been watered from pump, but it has not produced any crop in the years since irrigation thereon commenced.

A witness of 17 years' experience as a soil conservationist stated he had been familiar with the Smith land since 1941; that the area north of the irrigation lateral had been irrigated by pump as long as he had known the land; that the area south of the lateral was "quite hummocky"—that is, it has mounds, knolls, depressions, and undulations without any particular direction of slope extending for any distance—"there is every slope imaginable"; that it could not be irrigated by gravity as the cost would be too much to level it, and to do so would expose too much topsoil, and if leveled the land would be unproductive and impracticable for farm operations—"Yes, and you wouldn't have much left when you got done"; and "It would be cheaper to buy other good land and forget about this, * * *."

The incidence that any part of the land south of the lateral was not irrigated during the period of 1939 through 1951 when there was available water brought to and conducted along its border and the value of the land would have been increased 100 percent by irrigating it, is not wholly without significance and influence when considered with the other facts disclosed by the record in concluding that this land was not susceptible of irrigation. The fact is that the part of the land south of the irrigation lateral is not suitable for irrigation. It is especially not suitable for gravity irrigation, and any attempt to make it so would involve an unreasonable expense and would result in the destruction of what fertility the land now has. The record is convincing that this land cannot from natural causes be irrigated by works of the appellant that are suitable only for gravity irrigation, notwithstanding the incidental recitation in the petition for the organization of the district that "all

of said land being susceptible to one mode of irrigation from a common source and by the same system of works."

Section 46-176, R. S. 1943, contains the mandate that: "* * * in no case shall any land be held by any district or taxed for irrigation purposes which cannot from any natural cause be irrigated thereby."

The order of the county board establishing and defining the boundaries of appellant is not conclusive that land within the boundaries could not, from some natural cause, be irrigated by the district. The fact in that regard may be raised and determined at any time in a proper case, and if land is nonirrigable by reason of natural causes, it cannot be held in an irrigation district and taxed. Andrews v. Lillian Irrigation District, 66 Neb. 461, 97 N. W. 336, first considered the quoted provision and said in reference thereto: "Whether a particular tract of land from some natural cause can not be irrigated, is a question which goes to the jurisdiction of the county board over such tract and may be raised at any time in a proper case, because section 49, supra, expressly denies the jurisdiction of the county board to include such land in an irrigation district, or to tax it for irrigation purposes. Should such land be included within the boundaries of an irrigation district, or taxed for irrigation purposes, it would be in violation of a plain provision of the statute. That being true, whether it should be held in such district, or taxed for irrigation purposes, does not depend on what is for the best interest of the district, nor on the consent of those holding bonds issued by the district, because the statute is mandatory that it should not be thus held and taxed. The statutory proceedings, therefore, to have lands detached, which make the question whether they shall be detached, or not, dependent on what is for the best interest of the district, and upon the consent of the holders of the district bonds, do not apply." See, also, Birdwood Irrigation District v. Brodbeck, 148 Neb. 824, 29 N. W.

2d 621; Sowerwine v. Central Irrigation District, *supra;* Annotation, 100 A. L. R. 1292.

The argument of appellant that the landowner may not resort to equity in an original action for relief from the inclusion of his land in an irrigation district of the class of the one involved herein, in direct violation of the statute upon which the district depends for its creation and existence, but that the landowner must depend upon the statutory procedure for detaching land from the district, is denied by the decisions of this court to which reference has just been made.

This court has discussed the meaning of the language "land * * * which cannot from any natural causes be irrigated thereby" in two cases. In Andrews v. Lillian Irrigation District, *supra,* it is said: "Evidently the legislature meant to exclude from the irrigation district, and from taxation in support thereof, lands that were not susceptible of irrigation. If, because of the natural conformation of the surface, lands within the irrigation district lay so high as to render it impossible to conduct water thereon by means of irrigation ditches for the irrigation of the land, it would hardly be contended that such lands were not, within the meaning of the section of the statute to which attention has been directed, land 'which can not from any natural cause be irrigated thereby,' and therefore could not lawfully be held in such district, and taxed to support the system."

In Wight v. McGuigan, 94 Neb. 358, 143 N. W. 232, it is significantly remarked that: "The owner of a specific tract of land ought not to be compelled to join an irrigation district and pay taxes for the support thereof if his land as a whole is so situated that for natural causes it cannot be irrigated. * * * If a government subdivision of land, or a tract otherwise capable of identification and definite description, is incapable of irrigation, and so situated with reference to the proposed district and other lands therein as to make such a course practicable, such tract might be omitted from the dis-

trict, although it formed a part of a larger tract of the same owner." The 65 acres of the land of appellee south of the irrigation lateral is land which cannot, because of natural causes, be irrigated by appellant within the meaning of the statute as construed by the decisions of this court.

The findings and judgment of the trial court contain errors in the description and the statement of the character of the several parts of the land of appellee and because thereof the judgment should be, and is vacated and set aside, and a judgment should be rendered in this court.

It should be and is adjudged that the southwest quarter of Section 35, Township 4 North, Range 25 West of the 6th P. M., Furnas County, Nebraska, should be, and it is hereby detached and excluded from the Frenchman-Cambridge Irrigation District; that the taxes attempted to be levied upon the land by appellant for the years 1948, 1949, and 1950, should be, and they are adjudged to be null and void and they should be and are canceled, and the title to the land quieted against them; that appellant and all persons acting for it should be, and they are prohibited and enjoined from levying or attempting to levy any tax upon said land; and that appellee recover costs herein.

JUDGMENT OF THE DISTRICT COURT VACATED.
JUDGMENT RENDERED IN THIS COURT FOR APPELLEE.

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COTNER COLLEGE, A CORPORATION, APPELLANT, V. THE ESTATE OF ELMER E. HESTER, DECEASED, APPELLEE.
51 N. W. 2d 612

Filed February 8, 1952. No. 33031.

1. **Trial: Appeal and Error.** Findings of court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong.

2. **Estoppel.** Equitable estoppel is the effect of the voluntary admissions, representations, acts, or conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquired some corresponding right either of property, or contract, or of remedy.
3. **Bills and Notes: Estoppel.** General principles of estoppel apply in determining whether or not defendant, in an action on a promissory note between the original parties thereof, is estopped to defend upon the ground that there was a failure of consideration.
4. **Bills and Notes.** As between the parties thereto, the consideration for a subscription note is tested by the situation existing at the time it is sought to enforce the subscription.
5. **Charities: Colleges and Universities.** In the absence of any stipulations upon the subject in terms of the subscription, the abandonment of a charitable or public enterprise releases the subscriber to its fund, the law implying that the enterprise must be existing when payment is demanded.
6. **Bills and Notes: Colleges and Universities.** It is an implied condition of a subscription note that the money shall not be diverted from the purpose for which it was subscribed and that the enterprise shall not be abandoned.
7. **Contracts.** The general principles governing the performance of contracts apply to subscriptions. If a material change in the plan or purpose for which a subscription is made is effected without the consent of the subscriber, he is excused from performing his promise unless estopped to deny his consent to the change.
8. ———. Where there is a total failure of consideration and defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such failure of consideration may be shown in bar of the action.
9. ———. The doctrine of substantial performance has no application where the party obligated to perform deliberately and intentionally departs from the terms of the contract and attempts to substitute another type of performance.
10. ———. It does not follow that because a technical rescission has not been made, and cannot be made, that a defendant cannot avail himself of the defense of want or failure of consideration.

APPEAL from the district court for Dundy County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

*Clarence G. Miles* and *Frank B. Morrison,* for appellant.

*Stevens & Scott, Van Pelt, Marti & O'Gara,* and *Hines & Hines,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

This action originated as a claim filed by plaintiff in the county court against the estate of Elmer E. Hester, deceased, to recover upon a subscription endowment note. The claim was disallowed. Upon appeal to the district court a jury was waived and the issues were tried to the court. The defense, insofar as important here, was failure of consideration, to which claimant replied that the estate was estopped to make such defense. In its decree the trial court found and adjudged the issues generally in favor of the estate and disallowed the claim.

A motion for new trial was overruled, and plaintiff appealed to this court, assigning substantially: (1) That the trial court erred in its refusal to admit and consider certain evidence; and (2) that the judgment was not sustained by the evidence but contrary thereto and contrary to law. We conclude that the assignments should not be sustained.

Preliminary to discussion of the primary issues, we dispose of the first assignment. On examination by plaintiff of its secretary-treasurer, it was shown that before a new program of religious education was inaugurated by plaintiff in 1946, its board of trustees canvassed its assets and exhibit 13 was identified as a list of its estate and other notes, of which the note here involved was one. The exhibit itself was never offered or received in evidence. In that situation the witness was asked in effect whether or not the note here involved was considered by the board along with all other notes at the time the matter of continuing the college

program was being considered. Objection thereto, as self-serving and calling for a conclusion of the witness, was sustained. In that connection, plaintiff then offered to "show by the witness that among all of the other assets which the college regarded that it owned, this note was considered by the board in connection with deciding whether or not to continue a future educational program." Thereafter a like objection thereto was made and sustained. The witness was then handed exhibit 13 and asked by plaintiff's counsel whether or not it was "in the same condition it was when it was considered by the board" and was permitted to answer "Yes" without objection. Thereafter, with no new question pending, plaintiff offered "to prove that the list represented by Exhibit No. 13 was considered by the Board of Trustees of Cotner College prior to and at the time of determining whether or not to go forward with a further educational program shortly before September, 1946." The objection thereto was renewed and sustained. Plaintiff argued that the trial court erred in so ruling. We conclude otherwise.

The question and offers clearly called for a conclusion of the witness, and the offers were either broader than the question or not responsive to any question to which an objection had been sustained. However, in any event the ruling if erroneous was not prejudicial to plaintiff, since the offer was merely cumulative, not only of evidence given by the witness then testifying, but also by another member of the board of trustees, who was permitted without objection to answer at length comparable questions.

Plaintiff also argued that the trial court erred in refusing to consider or admit exhibit 22, a mimeographed letter dated "June 6, 1947" addressed "Dear Friend" and signed "Cotner College P. R. Stevens (stenciled) P. R. Stevens, Pres." It extended greetings to an unidentified old friend of Cotner College and simply contained information relating to its new program of re-

ligious education, which required no reply. As a witness for plaintiff, Stevens testified that he personally mimeographed the letter and mailed a copy to Elmer E. Hester at Benkelman, Nebraska. Offer of the exhibit was objected to for want of sufficient foundation, and that it was incompetent and immaterial. The objection was sustained. Plaintiff thereafter called the executrix as its own witness to have her identify the exhibit as one having been received by deceased during his lifetime. In that connection her testimony was that she had lived in the Elmer E. Hester home after 1947 and would have seen such a letter because she looked after all his correspondence, kept by him in voluminous files. However, she testified that she had never seen such a letter and although having made a thorough search of Elmer E. Hester's papers, she could not find such a letter. The exhibit was then re-offered, to which the previous objection was renewed, with the addition "It relates to a transaction of a deceased party. Mr. Hester isn't here to admit whether he received that letter."

Concededly, no demand ever had been made by plaintiff for production of the original, and plaintiff's own evidence affirmatively established that no sufficient foundation had been laid for its admission. In any event, however, its exclusion could not have been prejudicially erroneous in the absence of any evidence, as hereinafter observed, which could make estoppel operative to prevent defendant from relying upon the defense of failure of consideration. Viewed in that light, we are not required to discuss or decide whether or not the letter and such evidence as related thereto was a transaction between deceased and a witness having a direct legal interest in the result of the suit within the purview of section 25-1202, R. R. S. 1943.

It is well at this point also to dispose of the issue of estoppel. The doctrine was applied in Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365, 73 Am. S. R. 491, 42 L. R. A. 794, an action to recover on a promissory

note, wherein it is said: "An estoppel in pais is defined to be 'a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' Mr. Pomeroy has formulated the following definition: 'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.' (2 Pomeroy, Equity Jurisprudence 804.)" In the light of such rules the doctrine of estoppel was applied to permit recovery.

As stated in 31 C. J. S., Estoppel, § 59, p. 236: "Equitable estoppel or estoppel by misrepresentation is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct; and it arises where a person, by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and the other person rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts." Also, as stated in 10 C. J. S., Bills and Notes, § 485, p. 1048: "General principles of estoppel or waiver apply in determining whether the defendant, in an action on a negotiable instrument, is estopped, or has waived his right, to set up a defense thereto." See, also, § 485, p. 1057, where it is stated: "In accordance with general rules considered supra § 485 a, in a proper case defendant may be estopped to set up the defense that the

original consideration was illegal, or that there was a want or failure of consideration, * * *."

In Lowe v. Keens, 90 Neb. 565, 133 N. W. 1127, Ann. Cas. 1913B 430, relied upon by plaintiff, the defendant therein was fully cognizant of, participated in, and consented to the change of plans for construction of a church to which he had subscribed. It has no application here.

In that connection, there is no competent evidence in this record that the makers ever performed any act or made any admissions or representations upon which plaintiff could have relied, and under the circumstances they had no duty to speak. There is no competent evidence that the Hesters ever had any knowledge or notice, much less that they acquiesced in what plaintiff did. Further, the obligations or expenditures by plaintiff to establish its new program were not assumed or expended to carry out the purpose for which the subscription was intended. Therefore, the doctrine of estoppel has no application in this case.

We turn then to other contentions. This is a law action. It is well established in this jurisdiction that: "Findings of court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed unless clearly wrong." Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768. As stated in such opinion: "The weight of evidence or credibility of witnesses is not a concern of this court in the review of such a case except to determine that the findings and judgment are supported by evidence and are not contrary to law." See, also, In re Estate of Wotke, 133 Neb. 739, 277 N. W. 45.

The note here involved read:

"COTNER COLLEGE ENDOWNMENT NOTE.

"$25,000.00 Benkelman Nebr. Dec 31st 1921.

"In consideration of our interest in Christian Education and for the purpose of producing an Endowment for Cotner College and for value received, we hereby

subscribe and promise to pay to Cotner College, Bethany, Nebraska, the sum of _____ Twenty five thousand Dollars, due and payable at the death or before at the option of the makers with interest at the rate of one per cent per annum, beginning January 1st 1924.

"This Endowment Note is made subject to the following conditions;

"FIRST, when the principal sum of this note shall have been paid in full or any part the makers, at their option may ask and demand of Cotner College, Annuity Bonds bearing interest at the rate of Five per cent per annum.—

"SECOND, At the option of the makers of this note sufficient of the annuity privilege may be surrendered to constitute two full scholarships in perpetuity to graduates of accredited High Schools who shall live in that part of Nebraska, lying west of the One Hundred first principal Meridian, and the Scholarships shall be known as the, _____ Elmer E. and Minnie B. Hester Scholarships. The beneficiaries of these scholarships shall be needy students and selected by the President of Cotner College, the Head of Sacred Literature Department and the President of the Volunteer Band.

(Signed) ELMER E. HESTER
MINNIE B. HESTER

Witness
A. D. HARMON
M. F. HIGGINS"

Its execution is admitted. It is conceded also that on January 24, 1925, the makers paid $250 interest thereon, and that Minnie B. Hester died May 18, 1943, and Elmer E. Hester died September 18, 1949.

The trial court specifically found and adjudged in its decree: "Upon consideration of the files, the evidence, and the arguments of counsel, the court, being fully advised in the premises, finds generally in favor of the objectors and against the claimant, Cotner College, and that the allegations of the objections or answer of the

objectors are true. The court further finds that at the time Elmer E. Hester and Minnie B. Hester executed the note involved herein Cotner College, a legal corporation, maintained its educational institution at Bethany, Nebraska; that it offered several courses of study as an Arts and Religious School of Instruction; that it had approximately 350 students; that it maintained a Boys Dormitory and a Girls Dormitory in connection with its college; that during the latter part of the nineteen-twenties Cotner College became involved in indebtedness; that by reason of such indebtedness and of the general financial condition of the country, and of its supporting constituents, it was forced to suspend its educational program and close its college in the spring of 1933; that at said time in 1933 all educational activities of said college ceased at Bethany, Nebraska, and have never been revived; that the attempted renewal of educational facilities in 1946 by Cotner College near the campus of the University of Nebraska and of the College of Agriculture is not a renewal of its former educational program and is not the type of education formerly provided at Bethany. The court further finds that by reason of the failure of the claimant to maintain and continue its educational program and by reason of the suspension and abandonment of its educational facilities of Cotner College at Bethany, Nebraska, the consideration for the note involved herein wholly failed, and the estate of Elmer E. Hester is not liable thereon.

"IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the court that the claim of Cotner College be and the same hereby is disallowed, and the costs of this action are taxed to the claimant."

In that connection, an examination of the record discloses ample competent evidence supporting such findings and judgment. Therefore, unless the decree was contrary to law, it will be sustained. We conclude that it was not contrary to law.

In that connection, there was concededly a consider-

ation for the note when it was executed. The question here is whether or not the consideration subsequently failed, since consideration for the promise is tested by the situation existing at the time it is sought to enforce the subscription. 50 Am. Jur., Subscriptions, § 9, p. 783. See, also, Continental Co. v. Eilers, 134 Neb. 278, 278 N. W. 497.

"It is an implied condition of a subscription that the money shall not be diverted from the purpose for which it was subscribed and the enterprise shall not be abandoned." 50 Am. Jur., Subscriptions, § 19, p. 791. As stated in § 25, p. 794: "Also, in the absence of any stipulations upon the subject in terms of the subscription, the abandonment of a charitable enterprise releases the subscriber to its fund; the law implies that the enterprise must be existing when payment is demanded." As stated in § 23, p. 793: "The general principles governing the performance of contracts apply to subscriptions. If a material change in the plan or purpose for which a subscription was made is effected without the consent of the subscriber, he is excused from performing his promise, unless there has been a waiver, or unless he has estopped himself to deny his consent to the change."

In 12 Am. Jur., Contracts, § 359, p. 925, it is said: "A fortiori, where there is a total failure of consideration and the defendant has derived no benefit from the contract or none beyond the amount of money which he has already advanced, such total failure of consideration may be shown in bar of the action.

"Where one party has disabled himself from performing, the other party is not obligated to perform." Also, as stated in the same section on p. 926: "It does not follow that because a technical rescission has not been made, and cannot be made, that a defendant cannot avail himself of the defense of failure or want of consideration." As stated in § 360, p. 927: "A failure of consideration of such a degree that the remaining con-

sideration may be deemed to be no substantial consideration is an excuse for nonperformance of a promise." See, also, 7 Am. Jur., Bills and Notes, § 252, p. 949.

The foregoing propositions of law are stated in another manner in 17 C. J. S., Contracts, § 129, p. 476, wherein it is said: "Although, strictly speaking, it has been said there can be no such thing as failure of consideration, many cases have laid down the rule that when the consideration for a promise wholly fails the promise is unenforceable, and it has been stated that the doctrine of failure of consideration is predicated on the happening of events materially changing the rights of the parties, which events were not within their contemplation when the contract was executed." See, also, 10 C. J. S., Bills and Notes, § 518, p. 1142.

In Restatement, Contracts, c. 10, § 274, p. 399, it is said: "(1) In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional." In the Pocket Supplement of Nebraska Annotations to § 274, it is said: "This statement is in accord with the Nebraska law." Thereafter, Nebraska cases too numerous to cite herein are listed as supporting the statement.

Also, as stated in Restatement, Contracts, § 281, p. 415: "In promises for an agreed exchange, a promisor is discharged from the duty of performing his promise if substantial performance of the return promise is impossible because of the non-existence, destruction or impairment of the requisite subject-matter or means of performance, provided that the promisor has not himself wrongfully caused the impossibility or has not assumed the duty that the subject-matter or means of performance shall exist unimpaired." The afore-cited annotation also cites numerous Nebraska cases supporting that statement.

In In re Estate of Griswold, 113 Neb. 256, 202 N. W.

609, 38 A. L. R. 858, relied upon by plaintiff, the primary question was whether or not a comparable endowment subscription note was based upon a valuable consideration. Therein it was concluded that assumption by the payee of obligations express or implied to carry out the purposes for which the note was given and intended was a sufficient consideration. There was no question of subsequent failure of consideration. In fact, the payee therein fully performed all its obligations at all times. This court so concluded in the opinion, which affirmed a judgment for plaintiff. The case is not controlling here as precedent for plaintiff. Rather, there are statements in such opinion supporting the position of defendant.

Carson Estate, 349 Pa. 529, 37 A. 2d 488, involved a comparable subscription note and subsequent failure of consideration. In that opinion it is said: "It was a contract. There is no question at this time that it was a valid contract, and that it was supported by consideration sufficient to contracts of this sort. Under the contract both decedent and appellee had mutual obligations. Appellee was obliged, by the express terms written in the solicitor's handwriting, to begin the 'construction of the John F. Carson Memorial building.' * * * It is no reflection on appellee's good faith that it was not able to perform the contract according to its terms. No doubt it would have done so if the funds could have been obtained. The hard fact is, however, that it did not fulfill the contract. Nor can it be claimed that, equitably, it is entitled to the benefits of the contract upon the doctrine that it has substantially performed its agreement by converting its available resources to the accomplishment of the purpose for which the proposed Memorial Hall was intended. The doctrine of substantial performance has no application where the party obligated to perform deliberately and intentionally departs from the terms of the contract and attempts to substitute another type of performance." See, also, Turknett v. Western College of New Mexico

Conference of the Methodist Episcopal Church, 19 N. M. 572, 145 P. 138.

In Simpson Centenary College v. Tuttle, 71 Iowa 596, 33 N. W. 74, the defense was failure of consideration. The subscription note was a donation to the endowment fund, the interest of which was to be used to maintain an academic college, then at Indianola, Iowa. However, payee used such funds to establish a law school in Des Moines, Iowa, 20 miles from Indianola. In that opinion it is said: "The note sued upon is still in the hands of the payee; and, notwithstanding the use of the words 'value received,' the question of consideration is still open. * * * The obligations and expenditures on the part of the donee which might prevent the interposition of the defense of want of consideration must be directly in the line of the purpose for which the gift of the note or promise to give was intended. A diversion of the funds to other purposes, contrary to the intent of the donor, would certainly be a good excuse for withholding the consummation of the gift; and, if the plaintiff is diverting the funds created by the donations to purposes not contemplated at the time of the gift, but in violation of the agreement on which the promise was based, in such a manner as to show want of good faith on the part of the donee, the proof of such diversion is a defense to the note in the nature of a failure of consideration." In the case at bar, an academic college conducting a general program of Christian education and fully equipped therefor with lands, buildings, and faculty, was located at Bethany, a suburb of Lincoln, when the note was executed. That property was lost, its faculty discharged, and its program completely abandoned from 1933 to 1946 when a new and completely different program, insignificant in comparison and described as "distinctly a school of religion," was established in minor quarters in a different atmosphere amidst metropolitan surroundings in Lincoln, four miles away. The afore-cited case is singularly comparable with that at bar.

Rutherford College, Inc. v. Payne, 209 N. C. 792, 184 S. E. 827, involved the right to recover upon a subscription note, comparable with that at bar. It was tried to a jury wherein a verdict was directed and judgment entered thereon for plaintiff. Upon appeal, the court reversed the judgment and awarded a new trial substantially upon the premise that defendant would not be liable on the note if the jury found that subsequent to its execution the college became insolvent and unable to use its endowment fund because it had discontinued the same as a school operated by it for the promotion of Christian education. In material respects that case is comparable with the one at bar.

As stated in Commercial Travelers' Home Assn. v. McNamara, 95 App. Div. 1, 88 N. Y. S. 443: "The law is not so absurd as to hold one to his subscription or promise to give to a charitable or public enterprise after the enterprise has been abandoned. If no condition be attached, the law will imply that the enterprise must be existing when payment is demanded." See, also, Indianapolis Bible Institute v. Kiddey, 98 Ind. App. 567, 187 N. E. 846, and the Annotation, Abandonment of Enterprise, 48 L. R. A. N. S. 811, with cases cited.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

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EMMA STOLTING ET AL., APPELLEES, V. ARTHUR EVERETT ET AL., APPELLANTS, IMPLEADED WITH ANTHON F. STOLTING, APPELLEE.

51 N. W. 2d 603

Filed February 8, 1952. No. 33079.

1. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be re-

solved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.

2. **Appeal and Error.** This court will not disturb the findings of a jury unless on an examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong.
3. **Waters.** A riparian owner may not embank against the overflow of running streams when the effect is to cause an increased volume of water on the land of another riparian owner to his injury, and if he does so he is answerable in damages.
4. **Waters: Damages.** In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, and which it is alleged were thrown upon the plaintiffs' land by the negligent and improper construction of jetties and a dike, the burden of proof is on the plaintiffs to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages caused thereby.
5. **Evidence: Trial.** Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony.

APPEAL from the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

*Albert L. Detmer, Denney & Denney, J. W. Weingarten,* and *W. P. Loomis,* for appellants.

*Hubka & Hubka* and *George A. Skultety,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This action was commenced in the district court for Jefferson County to recover damages for injury done to the plaintiffs' lands by the floodwaters of the Little Blue River. As a basis for the action the plaintiffs claim that the damage to their lands was caused by the careless, negligent, and wrongful construction, reconstruction, and maintenance of jetties and a dike by the defendants which prevented the floodwaters of the Little Blue River from flowing in its natural flood channel

but caused it to flow over their lands in such manner as to wash away the top soil thereof and cut a new channel across it. The jury found for plaintiffs and assessed the amount of damages in the sum of $6,500 and rendered verdict accordingly. Defendants filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The court overruled this alternative motion and rendered judgment on the verdict. It is from the overruling of the alternative motion and rendering of the judgment that this appeal was taken.

Appellees, including the defendant Anthon F. Stolting, are the heirs of Henry Stolting, deceased, and the owners of the damaged land. We will refer to this land as the Stolting lands. Appellants are Arthur and Mary Everett and the Chicago, Burlington & Quincy Railroad Company. In this opinion, when it is necessary to refer to the appellants severally, we will refer to them respectively as the Everetts and the Railroad, and to the lands owned by the Everetts as the Everett lands.

It is the appellants' primary contention that the evidence adduced is not sufficient to sustain the jury's finding that what they did caused the damage to the Stolting lands and therefore the trial court erred in not sustaining either their motion for a directed verdict or, after verdict, their motion for judgment notwithstanding the verdict.

The rules applicable are as follows:

"In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Krichau v. Chicago, B. & Q. R. R. Co., 150 Neb. 498, 34 N. W. 2d 899.

"Where the evidence was insufficient to sustain a judgment in favor of the plaintiff, it was the duty of the trial court to sustain a motion directing a verdict for de-

fendant at the close of plaintiff's evidence." Goodhart v. Chicago, B. & Q. R. R. Co., 146 Neb. 290, 19 N. W. 2d 549.

"If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict." Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

"In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Smith v. Platte Valley Public Power & Irrigation Dist., 151 Neb. 49, 36 N. W. 2d 478.

"This court will not disturb the findings of a jury unless on an examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong." Keyser v. Allen, 149 Neb. 449, 31 N. W. 2d 309.

The lands herein involved lie in the flood plane of the Little Blue River as its winding course passes through the south half of Section 5, Township 1 North, Range 3 East of the 6th P. M., in Jefferson County, Nebraska, which is just west and a little south of Endicott. The flood plane of the Little Blue is generally about a half to three-quarters of a mile wide. The right-of-way, grade, and tracks of the Railroad also pass through the south half of Section 5. The right-of-way is 100 feet wide and runs generally in an east to west direction although slightly to the southwest. When it reaches the northeast corner of the southeast quarter of the southwest quarter of the section the turn to the southwest increases. It passes out of the section at about the southwest corner thereof. It crosses

the Little Blue at more or less of a right angle at a point near the west edge of the southeast quarter of the southwest quarter of the section. The grade of the railroad roadbed is about 10 to 11 feet above the general level of the flood plane. That part of the Everett lands herein involved is their land lying in the flood plane of the Little Blue just north of and adjacent to the right-of-way and immediately east of and adjacent to the Little Blue as it turns south in its course to pass under the main bridge. That part of the Stolting lands herein involved is their land lying just south of the right-of-way and more or less within a horseshoe bend of the Little Blue. It is, for all practical purposes, located in the southeast quarter of Section 5 and consists of 64.46 acres of which 50 acres were subject to cultivation. It is this 50-acre tract that was damaged. The remainder of the tract, or 14.46 acres, is covered with trees and lies adjacent to and immediately south of the right-of-way. The Railroad owns approximately 13 acres in this flood plane besides its right-of-way. This land lies in the north part of the southeast quarter of the southwest quarter of the section. It is north of the Little Blue and adjacent to the Everett lands which lie immediately to the north. It is divided by the right-of-way.

Located in the right-of-way in the area herein involved are three bridges. The first is the main bridge over the Little Blue which, with a trestle adjacent thereto on the east, is 668 feet long. East thereof some 1,600 feet is a 200-foot bridge referred to as the middle bridge. It has an opening under it varying from 4 to 8 feet in depth. East of the middle bridge some 1,300 feet is the Smith bridge. This bridge is 240 feet long and the opening under it varies from 4 to 13 feet in depth. It is over a natural stream called Smith Creek. The middle and Smith bridges are located in the right-of-way in an area where it lies between the Everett and Stolting lands.

Commencing in December 1947 the Railroad, in conjunction with the Everetts, commenced putting jetties

along the east bank of the Little Blue and dikes on the east bank thereof at the furthest east point in the bend of the river where, coming from the west, it turns south to pass under the main bridge. This was done for the purpose of preventing the river from cutting further to the east in the Everett lands and to prevent it from forming a new channel across the Everett lands in a line approximately through the middle bridge and from there across the Stolting lands and terminating in the present main channel of the river at a point about where Smith Creek now enters it. This work was continued until, in June 1950, it included a completed dike some 5 to 6 feet in height and some 1,450 feet in length. This dike extended from the east end of the trestle adjacent to the main bridge north and slightly to the west completely across the flood plane of the Little Blue north of the right-of-way.

During the six-day period extending from July 9 to 14, 1950, inclusive, the river was in flood stage. It did not reach the height of the 1941 flood but did completely cover the river's flood plane. The dike herein referred to as having been completed in June 1950 completely, except for a very small and insignificant trickle around the north end thereof, prevented any of the floodwaters of the river from flowing east across the Everett lands in the river's flood plane lying north of the right-of-way and then through the middle and Smith bridges. It had the effect of forcing all of the waters flowing in the valley of the Little Blue to flow under the main bridge and trestle adjacent thereto, and then into the main channel and that part of its flood plane which is south of the right-of-way and just east of the main bridge. During this flood the waters flowing across the Stolting 50-acre tract cut a new main channel across it and also severely washed and eroded, or covered with gravel and sand, the other parts thereof.

The 50 acres of the Stolting lands so damaged were of a rich sandy loam and in a good state of cultivation. The

evidence fully supports that it was damaged in the amount fixed by the jury.

Appellants' interference with the natural flow of the floodwaters of the river was subject to the following:

"We think our decisions have committed us to the doctrine that a riparian owner may not embank against the overflow of running streams when the effect is to cause an increased volume of water on the land of another riparian owner to his injury, and if he does so he is answerable in damages." Hofeldt v. Elkhorn Valley Drainage Dist., 115 Neb. 539, 213 N. W. 832, 53 A. L. R. 1174.

"A riparian owner may not dam or dike against such flood waters to the injury of adjacent owners of lands or crops growing thereon." Frese v. Michalec, 148 Neb. 567, 28 N. W. 2d 197.

"The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another." Stocker v. Wells, 150 Neb. 51, 33 N. W. 2d 445.

It was, of course, incumbent upon the appellees to sustain the burden of establishing that the dike was the cause of their damage and the extent thereof. As stated in Goodhart v. Chicago, B. & Q. R. R. Co., *supra:* " 'In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, and which it is alleged were thrown upon the plaintiffs' land by the negligent and improper construction of a railroad nearby and adjacent thereto, the burden of proof is on the plaintiffs to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages

caused thereby.' Harris v. Lincoln & N. W. R. Co., 91 Neb. 755, 137 N. W. 865. See, also, Alt v. Chicago, B. & Q. R. Co., 96 Neb. 714, 148 N. W. 900."

From the evidence adduced the jury could have found that the Everett lands north of the right-of-way and east of the river had always been in the river's flood plane; that since 1902 floodwaters of the river had flowed east and a little south across this land to pass under the middle and Smith bridges; that this part of the river's flood plane carried up to 50 percent of the floodwaters of the river not flowing in the main stream; that the dike completely, for all practical purposes, prevented floodwaters from flowing east across the Everett lands north of the right-of-way; that the dike materially increased the amount of water flowing under the main bridge and trestle adjacent thereto; that because of this increased volume the speed of the water flowing under the main bridge was greatly increased giving it a much greater cutting and washing power than it had ever had before as evidenced by its cutting a deeper channel under the main bridge, by its cutting of the high bank and washing out large trees in the south bank of the river as it turned east some 400 feet south of the main bridge, by its cutting away a substantial area of the north point of a peninsula west of where Rose Creek enters the river and its washing away many trees located thereon, and by its cutting the bank and washing out many trees on the Stolting land on the north bank of the river east of the mouth of Rose Creek; that the increased volume of water with its increased flow passed through the very narrow flood channel of the river between the mouth of Rose Creek and the right-of-way as it approached the Stolting land in the horseshoe bend some 40 rods to the east; that this increased volume and speed gave it cutting and washing power greater than it had ever had before; that as it approached and traveled onto and over the Stolting land it was not met by floodwaters coming through the middle bridge,

as had always been the situation before, but flowed on to the east and north without interference; that in fact the floodwaters flowed north through the middle bridge instead of south as it had always been wont to do; and that this increased flow of water hit the west edge of this 50-acre tract of land with a velocity which gave it a much greater cutting and washing power than it had ever had before and, being uninterfered with from floodwaters coming south through the middle bridge, caused all the damage for which recovery is here sought.

In this respect it should be stated that while this 50-acre tract has always been in the flood plane of the river and subject to overflow it had never, prior to the construction of the dike, been seriously damaged thereby, including the flood in 1941 which it appears was the highest flood of which there is a record.

We have not overlooked the fact that appellants offered evidence of witnesses who were of the opinion that numerous other factors, such as the flow of the floodwaters of Rose Creek entering the Little Blue at right angles not too far upstream from this tract, the cleaning out of the underpass and straightening of the river's approach to the Stanley bridge some 50 rods east of the east line of Section 5, the obstructions in the old channel of the horseshoe bend, the damming of a cutoff from Rose Creek to the old river channel in the horseshoe bend, and the low area across the 50-acre tract, caused the damage. This testimony only presented a question of fact for the jury.

In this respect it is appellants' thought that the evidence of their two experts was conclusive on this factual issue as a matter of law. While it was a subject to which expert testimony was relevant it is not a subject which lends itself exclusively to that type of testimony. Lay witnesses could testify to what they observed and from all the testimony it was for the jury to determine the ultimate question.

Under ordinary circumstances expert opinion evidence

is to be considered and weighed by the triers of fact like any other testimony. See, 32 C. J. S., Evidence, § 569, p. 390; Morse v. Chicago, B. & Q. Ry. Co., 81 Neb. 745, 116 N. W. 859.

Appellants contend that the trial court, by refusing to give its instruction No. 1 and by the giving of its instructions Nos. 2 and 9, failed to properly submit to the jury the issue raised by their answer, and supported by evidence, that they had a right to do what they did because what they did was reasonably necessary to prevent the waters of the Little Blue from creating and establishing a new channel across their lands.

"A riparian owner may restore to its former channel a stream which erosion has caused to flow in a new channel upon his land, providing he does so within a reasonable time after the new channel formed and before the interests of lower riparian proprietors along the course of the old channel would be injuriously affected by such action on his part, * * *." Johnk v. Union P. R. R. Co., 99 Neb. 763, 157 N. W. 918, L. R. A. 1916F 403. See, also, Whipple v. Nelson, 143 Neb. 286, 9 N. W. 2d 288.

What is said of restoring a stream to its former channel would likewise be true of keeping the stream in its original channel. But this right is subject to the following: " 'The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another.' Beetison v. Ballou, 153 Neb. 360, 44 N. W. 2d 721." McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912.

The following taken from Fremont, E. & M. V. R. R. Co. v. Harlin, 50 Neb. 698, 70 N. W. 263, 61 Am. S. R. 578, 36 L. R. A. 417, is applicable here: "The next argument is that the court refused to instruct the jury, on

behalf of the railroad company, to the effect that if the jury found that the ditches were properly constructed with reference to the use of the same for railway purposes, that they should find for the railroad company. * * * The material issue on trial was not whether the ditches were sufficient and proper for the draining of the railroad company's right of way and road-bed, but the material issue was whether the railroad company had so constructed its ditches as to unnecessarily and negligently injure the property of its neighbor. The instruction under consideration refused by the court, if given, would have made the case turn on an immaterial issue. A railroad company might construct a bridge, an embankment, a culvert, or a ditch sufficient for the maintenance and operation of its road, and one entirely proper for that purpose, and yet the improvement made might be of such a character as to unnecessarily and negligently injure the property of an adjoining proprietor. * * * This is not a suit in which the plaintiff claims damages because the railroad company did not properly construct its ditches for railroad purposes, but the principle upon which this action rests is that the railroad company, in the lawful possession and use of its property, so used and managed it as to unnecessarily and negligently inflict an injury upon its neighbor."

We find that the appellants had a fair trial and since their contentions are without merit we affirm the verdict and judgment of the trial court.

AFFIRMED.

HAROLD O. HAMMER, APPELLANT, V. ESTATE OF CAROLINE HAMMER, APPELLEE.
51 N. W. 2d 609

Filed February 8, 1952. No. 33081.

1. **Pleading.** When a plaintiff pleads a fact which is material to the issue being tried, he thereby assumes the burden of proving the existence of such fact.
2. **Trial.** Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Affirmed.*

*Oscar T. Doerr* and *Paul J. Garrotto,* for appellant.

*Webb & Kelley* and *Joseph H. McGroarty,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

Plaintiff initiated this action by filing a claim against the estate of Caroline Hammer, deceased, based on an alleged oral contract with deceased. The matter was heard in the county court and the claim disallowed. Plaintiff appealed to the district court where issues were made and trial was had. At the close of plaintiff's case-in-chief, defendant moved for a directed verdict or a dismissal. The trial court sustained the motion and dismissed the action. Plaintiff appeals presenting questions as to the refusal of the trial court to admit offered evidence and contending that the evidence was sufficient to entitle him to have the cause submitted to the jury. We affirm the judgment of the trial court.

There was involved in the pleadings in the county and district courts an added claim that plaintiff should recover $5,000 for services rendered the deceased in her lifetime. There is no contention here that plaintiff pro-

duced sufficient evidence to sustain that claim, hence no further mention will be made of it.

The deceased and her husband lived in Omaha, Nebraska. Plaintiff refers to them as his aunt and uncle. The evidence suggests that the blood relationship was with the uncle.

Plaintiff was born in Sweden in September 1913, his last name then being Pehrsson. Plaintiff came to America in 1926, and made his home with deceased and her husband. The husband died in 1940 and deceased died in 1947. Plaintiff went to school where he was registered under the name of Hammer. His citizenship and Army papers were issued under that name. He was graduated from high school in June 1931. In September 1931, he became steadily employed and continued in that employment until late in 1942, when he entered the United States Army. He was in the service 3 years and 2 months. Upon discharge from the Army he resumed his old employment for a few months. He lived in the home of deceased with her son and grandson, the deceased being then in a hospital. Sometime in 1946, plaintiff removed to the State of California where he has since lived and been employed.

There is some variance in the details of the claim as filed in the county court and as stated in the petition in the district court. In the district court plaintiff alleged that on or about October 1, 1931, decedent stated to plaintiff that "* * * if he would pay to her some money out of his earnings, she would save the money for him and that she would pay him interest on all such payments and that she would repay said money to him and double the amount whenever he married or required the money or upon her death"; that thereafter during the period up to and including November 16, 1942, he paid deceased the total sum of $6,550; that deceased did not perform her part of said agreement; that by her will she directed the disposition of all property in her possession to others; and that by reason

thereof plaintiff had "* * * been deprived of the consideration expressed in said contract and that claimant is entitled to recover from said estate the sum of $13,100.00 and interest at six per cent from the date of the various deposits made by him at double the amount of said deposits." Plaintiff prayed for judgment in the sum of $18,100 with interest at 6 percent "or double the amounts paid by claimant to decedent for safekeeping and investment," together with costs.

Defendant's answer is in effect a general denial and a denial of any indebtedness to the plaintiff. The cause was tried on these issues.

In his summary here of his claim in county court, plaintiff states that he and decedent "* * * had entered into a verbal agreement by virtue of which he was to give her a certain amount of his earnings which she would save for him, which amount she would double and invest and pay it to him at such time as he might marry or after her death."

In his statement of the case here, plaintiff states that the claim is "* * * for the sum of $13,100.00 with interest at 6% from the date of various deposits made with the decedent, pursuant to an agreement with the decedent that if he would deliver to her funds from time to time, she would save the money for him, and return it to him doubled when he would marry, or would require the money * * *."

There is no contention here but that plaintiff's right to testify was limited by the provisions of section 25-1202, R. R. S. 1943.

Plaintiff undertook to establish the claim by the testimony of third parties and by one exhibit, which the trial court refused to admit in evidence.

Plaintiff offered the evidence of five witnesses who testified as to conversations had with deceased at different times beginning in 1931 to a period after plaintiff went into the Army in 1942. The sum of this evidence is that deceased said plaintiff was saving money; that

he was paying money to her; that she was saving it for him so that he would have it when he got married or some other change occurred; that it was in the bank; and that she was adding a little to it. The testimony of one witness which is more specific is set out later herein.

This brings us down to exhibit 1 which plaintiff first offered in its entirety and then offered it for reasons hereafter shown, limited to entries down to and including October 1940. The trial court refused to admit it in evidence.

Exhibit 1 is a small book about 3 x 5 inches in size containing some 60 sheets of ruled paper. Written on the first page are plaintiff's name and address. On the second are names and addresses in Sweden. At the top of the third page is written "Harold Hammer paid to Mrs. Caroline Hammer," below that "1931," and below that, one entry "$125.00," then below that "x1932x" followed by entries on single lines "Jan 2 $20," "Jan 16 $20," and like entries on the 2nd and 16th of each month, totaled to "$480." On another page is "x1933x" followed by like entries for the 2nd and 16th of each month, excepting that the entries for the 2nd of each month are "$20" and those for the 16th are "$30." These entries are totaled to "$600" followed in a column by "$600," "480," "125," totaled to "$1205." Similar entries are made for the years, months, and days from 1934 to and including November 16, 1942, with one exception. The February 2, 1934, entry is "$30.00" and that of the 16th, "$20.00." Following each December 16 entry (in 1942, November 16) is a carrying forward of a balance and a final total of "$6505."

Plaintiff offered this initially as a book of account showing sums paid to deceased and also as a record of a transaction between plaintiff and deceased made in the regular course of business.

Later the fifth witness was asked about this exhibit. He testified that he first saw the exhibit "on the front room table" in deceased's home. He then started to

testify as to what deceased "told me late" in 1940 and apparently as to that date said "she had showed it to me at that one time" and "she told me there late in 1940 that he was saving money—about fifty a month—and that she was also putting fifty a month in there." Later he testified that he first saw the exhibit "the last part of 1939." Deceased then handed it to the witness and told him that plaintiff "was saving fifty a month and that she would put in that much with it, and that he was putting so much—well, each half; of course, each pay day it amounted to fifty a month," and that deceased "showed me the book and it showed the amounts in there of fifty a month." He further testified that when deceased handed him the exhibit she told him "it was a book the amounts was being kept in that (plaintiff) was saving money." He also testified that late in "'40, she told me that he had over five thousand saved then," and that later deceased told him plaintiff was "still saving his money and he was still giving her $50.00 a month yet," the last conversation being in April or May 1942.

Based on this testimony, plaintiff made the offer of that part of the exhibit up to and including October 16, 1940.

Plaintiff then testified that the entries in the exhibit were in his handwriting and made every month at or about the time of the dates contained in the exhibit; that the first entry was made in 1931, and the last in 1942; and that it was a book in which "I kept the records—."

Plaintiff then renewed the offer of the exhibit and it was not received.

We do not deem it necessary to determine the question of the admissibility of exhibit 1. Assuming, but not deciding, that the exhibit was admissible, as well as evidence admitted but later stricken, and assuming, but not deciding, the sufficiency of the evidence to show that plaintiff paid the deceased the money which

he contends was paid to her, the plaintiff has failed to prove the oral contract alleged and upon which he based his claim.

The evidence of payments claimed to have been made is at no point shown related to the contract alleged. There is no evidence that goes to show the existence of the agreement alleged to the effect that deceased agreed to double the amount which plaintiff paid to her, to pay it to him, and to pay interest thereon. Plaintiff has failed to prove essential allegations as to the contract which he alleged.

As we held in Fairchild v. Fairchild Clay Products Co., 141 Neb. 356, 3 N. W. 2d 581, "Under the issues plaintiff was required in the first instance to prove his contract * * *," and restated the rule that "When a party pleads a fact which is material to the issue being tried, he thereby assumes the burden of proving the existence of such fact." See, also, Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525; Masonic Temple Craft v. Stamm, 152 Neb. 604, 42 N. W. 2d 178.

Plaintiff having failed to prove essential allegations of his cause of action, the applicable rule is: "Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit." Campbell v. Columbia Casualty Co., 125 Neb. 1, 248 N. W. 690. See, also, Rzeszotarski v. American Smelting & Refining Co., 133 Neb. 825, 277 N. W. 334.

It necessarily follows that the judgment of the district court was not erroneous. It is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ETHEL LARSON ET AL., APPELLANTS, V. JOSEPHINE MORRISON ET AL., APPELLEES.

51 N. W. 2d 626

Filed February 8, 1952. No. 33085.

1. **Quo Warranto.** Quo warranto or a proceeding in the nature thereof lies only against one who is in possession and user of the office or who had been admitted thereto.
2. **Quo Warranto: Schools and School Districts.** When it is claimed that a school district has no existence as such because not created in the manner required by statute, the cause must proceed against the individuals who are usurping its franchises.
3. ———: ———. Quo warranto is a proper remedy whereby to test the legal entity of a school district and the status of its officers.
4. **Schools and School Districts.** The provisions of section 79-402, R. R. S. 1943, are mandatory and jurisdictional.
5. ———. Any signer of a petition to create a new school district from other districts or to change the boundary of any district may withdraw his signature therefrom at any time before the county superintendent has affirmatively acted upon such petition by authoritatively declaring the district created or change made.

APPEAL from the district court for Custer County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

*Roy E. Blixt,* for appellants.

*Edward E. Carr* and *Allen F. Black,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

This is an action in the nature of quo warranto to test the validity of a school district and oust respondents from office as members of the board thereof. After hearing upon the merits, the trial court rendered a judgment finding and adjudging the issues generally in favor of respondents and dismissing relators' action. Motion for new trial was overruled, and relators ap-

pealed, assigning substantially that the judgment was contrary to the evidence and law. We sustain the assignments.

The facts are not in dispute. They were either stipulated or undenied, and pleaded generally in relators' petition, which, contrary to respondents' contentions, stated a cause of action in quo warranto.

The record discloses that relators are residents, taxpayers, legal voters, and members of the school board of district No. 248, which was duly organized and lawfully performing the functions of a school district in Custer County.

Prior to filing the action here involved, and upon the filing thereof as well, relators complied in every respect with section 25-21,122, R. R. S. 1943, but the Attorney General and county attorney neglected and refused to file the proceedings.

The pertinent facts upon which relators claim the right to judgment are as follows: A duly qualified voter of district No. 248 circulated a petition among the legal voters thereof, requesting the county superintendent to divide the district into two separate districts, as provided in section 79-402, R. R. S. 1943. Such petition was signed by 17 persons residing in the district. Among such signers three were not legal voters and ineligible to sign the petition, which left but 14 lawful signatures thereon. The petition was filed in the office of the county superintendent on July 24, 1950, and on August 1, 1950, a sworn list of voters was also filed therein, purportedly to comply with section 79-404, R. R. S. 1943. Such list contained the names of 28 persons, but the 3 ineligibles aforesaid were also listed thereon, which left but 25 legal voters in the district.

On July 26, 1950, a written application signed by 18 legal voters, 7 of whom had signed the original petition, was filed in the office of the county superintendent, requesting that no action should be taken to create a new

district or divide the old until after the 1950-1951 school year.

Thereafter, on August 17, 1950, two legal voters filed a request in the office of the county superintendent to withdraw their signatures from the original petition, and thereby signified reasons for their intention to be considered as non-signers, which would have left but 12 signatures thereon, concededly less than 55 percent of the legal voters required by section 79-402, R. R. S. 1943, before the county superintendent had any jurisdiction, power, or authority to act.

In that connection, it will be noted that the county superintendent took no action whatever on the petition, did not even plan to act, and had made no decision whatever upon the petition until after she had consulted with the county attorney on August 28, 1950, after the aforesaid withdrawal of signatures. Nevertheless, on August 29, 1950, by written order directed to the county treasurer, and without any hearing, the county superintendent divided district No. 248, and reestablished district No. 157, formerly a part thereof, allegedly in conformity with section 79-402, R. R. S. 1943.

Pursuant to such order and notice, as provided by sections 79-410 to 79-413, R. R. S. 1943, inclusive, a meeting of purported school district No. 157 was held on September 11, 1950, whereat respondents were selected by persons attending the meeting to act as members of the school board for such district. This action was subsequently filed.

Whether or not, as argued by relators, the county superintendent was required to fix a time for hearing upon the petition and give relators and other interested parties an opportunity to be heard thereat before any action was taken, we are not required to decide, in view of other decisive reasons for disposition of the case upon the merits. It is sufficient for us to call attention to section 79-402, R. S. Supp., 1951, which now requires such to be done.

As we view it, there are but two questions presented: (1) Is quo warranto the proper remedy, and if so, who should have been made respondent parties; and (2) may a petitioner for the purposes provided in section 79-402, R. R. S. 1943, withdraw his signature after the petition is filed, but before it has been affirmatively acted upon by the county superintendent?

With regard to the first, section 25-21,121, R. R. S. 1943, provides: "An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this state without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law."

Section 25-21,122, R. R. S. 1943, with which relators concededly complied, provides: "Such information may be filed by the Attorney General or by the county attorney of the proper county whenever either of such officers deems it his duty so to do, except that the county attorney shall not have authority to file such information against any state officer or a judge of the district court; Provided, however, that any elector of the proper county may file such information against any person unlawfully holding or exercising the functions of any public office in the state, other than state officers or judges of the district court, whenever the county attorney of the proper county shall refuse so to do within ten days after he shall have been notified in writing by any elector that any such person is disqualified by the Constitution or the laws of the State of Nebraska to hold the office in question or to exercise the functions thereof. Any person other than the county attorney who shall institute such action shall file with such information

in the office of the clerk of the district court a bond signed by a duly authorized surety company or by two resident freeholders of the county in which the action is filed, the amount of which bond shall be not less than five hundred dollars and be fixed by, and the sufficiency of the sureties thereon approved by the clerk. The bond shall be conditioned that the plaintiff shall prosecute the action without delay and that he shall pay the costs of such suit including a reasonable attorney fee to the person against whom such information is filed should the action be unsuccessful. The amount of such attorney fee shall be fixed by the court and taxed as costs in the action."

With regard to parties, this court has held: "Quo warranto, or a proceeding in the nature thereof, lies only against one who is in possession and user of the office, or who has been admitted thereto." State ex rel. Good v. Marsh, 125 Neb. 125, 249 N. W. 295.

As said in State ex rel. Caldwell v. Lincoln Street Ry. Co., 80 Neb. 333, 114 N. W. 422, 14 L. R. A. N. S. 336: "But where, as here, it is claimed that it has no existence as a corporate body because not organized in accordance with our statute, the case must proceed against the individuals who are usurping corporate rights."

Likewise, in State ex rel. Summers v. Uridil, 37 Neb. 371, 55 N. W. 1072, it is said: "Under very similar statutes it has been held in several states, and we think rightly, that in such proceedings against the persons unlawfully exercising the powers of an office the legal existence of that office may be determined. (People v. Carpenter, 24 N. Y., 86; State v. Parker, 25 Minn., 215; State v. Gladwin, 41 Mich., 647; State v. Coffee, 59 Mo., 59.) Indeed it would seem that to institute proceedings against the village itself would be to recognize its existence as a corporation, and that if the incorporation is void the only proceedings must be against the persons undertaking to exercise its franchises." It clearly appears, then, that neither district No. 157 nor

the county superintendent would have been proper or necessary respondent parties.

With regard to the remedy, this court held in State ex rel. Summers v. Uridil, *supra*: "Quo warranto is the proper remedy to oust persons who are exercising the powers of corporate offices when the corporation has no legal existence." As stated in Dappen v. Weber, 106 Neb. 812, 184 N. W. 952: "'* * * It is likewise a well-established doctrine in this country that quo warranto is the proper remedy to inquire whether a municipal corporation was legally created, as well as to oust persons exercising the privileges and powers of corporate officers when the municipal corporation has no legal existence. State v. Uridil, 37 Neb. 371; State v. Dimond, 44 Neb. 154; State v. Mote, 48 Neb. 683; High, Extraordinary Legal Remedies (3d ed.) sec. 684. An information in the nature of a quo warranto, * * * is the appropriate remedy.' * * * This rule is applicable to school districts, as, like municipal corporations, they obtain their franchises from the state and are created for public purposes and to carry out strictly public policies." As stated in School District D v. School District No. 80, 112 Neb. 867, 201 N. W. 964: "It would seem from Dappen v. Weber, 106 Neb. 812, that quo warranto is the proper action whereby to test the legal entity of a school district and the status of its officers." See, also, 47 Am. Jur., Schools, § 24, p. 314, citing Dappen v. Weber, *supra*, and other cases as authority for the statement. Quo warranto was also recognized as a proper remedy in State ex rel. Tanner v. Warrick, 106 Neb. 750, 184 N. W. 896.

It is true, as held in State ex rel. Donavan v. Palmer, 18 Neb. 644, 26 N. W. 469, a mandamus suit, that: "An order of the county superintendent as to the formation, division or change of school districts where he has jurisdiction cannot be attacked in a collateral proceeding." As stated in School District No. 67 v. School District No. 24, 55 Neb. 716, 76 N. W. 420: "An order of the county

superintendent as to the formation or change of boundaries of a school district cannot be collaterally assailed where he acted within his jurisdiction. (State v. Palmer, 18 Neb. 644.) It is conceded by counsel for plaintiff that this action must fail unless the proceedings before the county superintendent consolidating the two districts were not erroneous merely, but were without jurisdiction and absolutely void; but they argue against the validity of the order of consolidation, and their contention is unanswerable." The cause at bar is a direct attack upon the proceedings before an order of the county superintendent as void for want of any jurisdiction and authority to act because of insufficiency of the petition required by section 79-402, R. R. S. 1943, and not because of any mere error or irregularity.

Respondents argued that relators had a remedy at law because they would have had a right to review such proceedings and order by petition in error, as held in Pollock v. School District No. 42, 54 Neb. 171, 74 N. W. 393. Be that as it may, under the circumstances presented here, where the county superintendent was without any jurisdiction and authority to act, relators were not required to pursue such remedy, and could prosecute an action in the nature of quo warranto.

Section 79-402, R. R. S. 1943, as applicable here, provides: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected."

As stated in Cowles v. School District No. 6, 23 Neb. 655, 37 N. W. 493, in speaking of comparable provisions: "These provisions are mandatory, and may, I think, be classed as jurisdictional. * * * The laws of this state, as well by policy as by letter, have left the control of the boundaries of school districts, primarily, with the legal voters of each district respectively. * * * After the first or original organization of a new county into one or more school districts, no new district can be formed, old one

altered, or the boundaries of any altered, without the movement therefor originating with the legal voters thereof, and their will to that effect being expressed by petition of the strength prescribed by statute. These are matters with which the school district, as a corporation, or quasi corporation, has been vested with neither power nor duty, nor has any district officer, board, or school meeting; but they rest with the voters in their capacity of petitioners, and with them alone."

In State ex rel. Donavan v. Palmer, *supra*, it is said: "The statute clothes the county superintendent with power, when certain conditions are complied with, to form new districts, and, when necessary, to make changes in those already existing. * * * He is invested with power, upon proper petitions being filed in his office, to create, divide, or change a school district or districts, and if he acts within the scope of his authority his orders are not subject to collateral attack." See, also, State ex rel. Shull v. Clary, 25 Neb. 403, 41 N. W. 256.

The final question then is whether or not the county superintendent here involved had any jurisdiction and authority to act. The answer depends entirely upon whether or not the persons who withdrew their signatures from the petition on August 17, 1950, had a right to do so before the county superintendent acted upon it August 29, 1950. We conclude that they did have such right, and that the county superintendent thus had no jurisdiction or authority to act upon the petition.

In that regard, this court said in Hoffman v. Nelson, 1 Neb. Unoff. 215, 95 N. W. 347: "We do not feel justified, in a purely statutory matter such as this, in placing any restriction upon the free action of a citizen which the law has not placed there and which no consideration of good morals or even propriety seems to require. We do not discover anything improper in a citizen, who thinks he is now better advised, changing his mind a second time as to the expediency of having such an election. * * * It seems to us better to say as defendants

in error do on page 18 of their able brief: 'He (the citizen) has absolute control of the matter as to whether or not his name shall remain upon the petition up to the moment that the board acts upon it.' "

In State ex rel. Tanner v. Warrick, *supra,* it is said: "The main question in the case is whether the evidence shows that the county superintendent had acted upon the petitions and declared the territory to be annexed before the withdrawals were filed. * * * It is conceded that petitioners might withdraw at any time before action was taken by the county superintendent." We concluded, however, from the evidence in that case, that there had been no withdrawals before the county superintendent acted upon the petition by declaring her approval thereof.

In Dappen v. Weber, *supra,* upon rehearing at 106 Neb. 817, 187 N. W. 230, citing State ex rel. Tanner v. Warrick, *supra,* as authority, the court concluded that petitioners might withdraw their names from the petition by written request at any time before action had been taken thereon by the county superintendent. See, also, State ex rel. Morgan v. Nemaha County, 10 Neb. 32, 4 N. W. 373. There are authorities seeming to hold a contrary view, but they are generally distinguishable by virtue of provisions of statute or controlling facts. The majority of cases comparable with that at bar adhere to the foregoing rule for the reason generally that the rule which permits a withdrawal of signatures at any time before final action upon the petition is more likely to result in real and mature judgment of the voters, and is calculated to discourage a hasty presentation of a petition for signature without a full disclosure of the real merits of the question. See, Annotation, 11 L. R. A. N. S. 372, where many cases are cited. See, also, the recent case of Paetzel v. Clift, —— Minn. ——, 48 N. W. 2d 731, which permitted the withdrawal, before any action had been taken thereon, of a school district resolution directed to the county board

requesting a dissolution of a school district and annexation to another. In the opinion it is said: "Without the initiating action of a school district vote, the county board in this case had no jurisdiction to enter its order, and the order is void."

Likewise, we conclude that without a petition signed by 55 percent of the legal voters, as required by section 79-402, R. R. S. 1943, the county superintendent had no jurisidiction or authority to enter the order creating district No. 157 or changing the boundaries of district No. 248, therefore the order was void.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is reversed, and the cause is remanded with directions to enter judgment in conformity with this opinion and the prayer of relators' petition. All costs are taxed to respondents.

REVERSED AND REMANDED WITH DIRECTIONS.

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GILMORE MCLEOD, APPELLANT, V. ANDREW MURPHY & SON, INCORPORATED, APPELLEE.
51 N. W. 2d 620

Filed February 8, 1952. No. 33105.

**Trial.** Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed.*

*Mecham, Stoehr, Moore, Mecham & Hills,* for appellant.

*Fred N. Hellner,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action for treble damages under the Emer-

gency Price Control Act of 1942. Issues were made and trial was had. At the close of plaintiff's case-in-chief, defendant moved for a directed verdict and an order dismissing the action. The trial court sustained the motion and dismissed the action. Plaintiff appeals. We affirm the judgment of the trial court.

Sometime in November 1944, a car of the plaintiff and a truck belonging to one Dan Thomas collided. The accident occurred near Valentine in Cherry County. Thomas was a contract dealer with defendant. Plaintiff agreed to pay the damages to the truck and told Thomas to take it to defendant at Omaha, have it repaired, and he would pay the bill. On November 23, 1944, defendant agreed to repair the truck, making the agreement with Thomas. Defendant thereafter performed work on the truck, furnished materials, and charged Thomas therefor $428.50 for labor, and $395.40 for parts. Thomas was entitled to a dealer's discount on parts. The discount here was $93.60, so that the net charge to Thomas by defendant was $730.30.

On January 24, 1945, defendant prepared an estimate of damages to this truck. It was directed to Thomas. It shows in considerable detail labor items of $458.15 and parts $720, and a total of $1,178.15.

Plaintiff had a man examine this estimate late in January or early in February 1945. On February 15, 1945, plaintiff and Thomas went to defendant's place of business. Evidently plaintiff examined the estimate for he states it contained items that should not have been there, some of which were taken off, but he does not show what items were taken away. In any event, plaintiff paid defendant $1,150 thereon that day and testified that in making the payment he was "paying for the damage to Thomas' truck." Defendant then paid to or credited Thomas with the sum of $419.70, being the difference between $1,150 and $730.30.

Plaintiff brought this action in January 1946, and in his petition alleged that he brought the action for treble

damages pursuant to the provisions of section 165 (205), Emergency Price Control Act of 1942 (Public Law 421, 77th Congress, 2d Session, p. 34), and as amended by the Stabilization Extension Act of June 30, 1944 (Public Law 383, 78th Congress, 2d Session, p. 640), and maximum price regulations issued pursuant thereto. He alleges that he (plaintiff) contracted with defendant to repair the Thomas truck; that "repair work was performed" for the sum of $1,178.15, in accordance with an estimate made by defendant on January 24, 1945; that the price of repairs set out in the invoice was in excess of the maximum price in the amount of $400; that part of the repairs were not furnished; that he demanded reimbursement for the overcharge; that it was not made; and that he was entitled to and prayed for treble damages or the sum of $1,200.

So far as material here, the answer is a general denial.

The action was not tried until May 1949. The motion for a new trial was overruled in June 1951.

Plaintiff's assignments here go to the proposition that the trial court erred in sustaining defendant's motion and in dismissing the action.

Plaintiff argues at length here that Thomas in taking his (Thomas') truck to the defendant for repairs and in contracting for the repairs acted as agent of the plaintiff. This contention is apparently for the purpose of bringing himself within the provisions of the act as one who bought a commodity. We do not deem it necessary to decide that question for the reason that plaintiff has failed to prove his contention that there was an overcharge under the act.

Plaintiff does not undertake to prove that there was an overcharge on any item or items of parts or labor shown on the estimate which he paid. He introduced no evidence as to applicable maximum prices. Rather he arrives at the overcharge on the basis of contending that the charges made to Thomas were the proper charges under the act and hence he was overcharged in

the amount of the difference between the estimate and the bill.

The initial error in plaintiff's position factually is that he assumes that the parts and labor for which Thomas was charged are the same as the parts and labor in the invoice which he paid, and that the difference of $419.70 between the two totals constitutes an unlawful overcharge.

It is clear from the evidence that Thomas was charged for labor performed and parts used in repairing the truck. There is no showing that all the work so done and the parts so used were in connection with the repair of damages done to the truck in the accident. It also appears that certain items of damage to the truck as a result of the accident were not repaired and were not included in the bill to Thomas. In short, Thomas was charged for parts actually used and to be used on the truck and for labor actually performed.

It appears from the evidence that the estimate which plaintiff had had examined and had himself examined before paying the $1,150 was designed as a basis for determining the amount of damages that Thomas had as a result of the accident. The ninth item listed in the estimate under "Parts" is "Freight charges from Valentine to Omaha," $100. Obviously that was not a repair item that defendant was called upon to furnish or expected to furnish. It appears that it was included in the estimate as part of the damages as compensation to Thomas for bringing the truck to Omaha for repairs. There also was included in the estimate "2 9.00x20 Tires & Tubes," $225, which defendant did not and could not furnish because of rationing restrictions during the war, and which plaintiff admitted Thomas could get elsewhere. Plaintiff testified that there was no damage done to tires, but the fact remains he paid an estimate that included that amount for tires.

There also was included in the estimate under "Parts" an item of $10.25 for repair of a tire and tube. The

evidence shows that this was a charge which defendant incurred with a third party in an effort to have a tire and tube repaired and later offered to reimburse plaintiff if it in turn got reimbursement for that item. It appears also that this $10.25 item was charged to Thomas. There were also included in the estimate under "Parts," one grille $13.50, and two running boards $19, which defendant could not secure and put on the truck at the time the other repairs were made. It appears that these items were charged to Thomas to be installed on the truck at a later date, and that they were among the items on which Thomas was allowed a dealer's discount.

It appears then that there were included in the estimate under "Parts," a total of $335.25 which defendant in no way furnished or was expected to furnish, and a total of $32.50 on items which defendant was to furnish later, or an over-all total of $367.75.

It appears further that there was included in the estimate for "Labor" an item of $45 for "Painting Damaged Parts." That painting was not done and could not be done until the grille and running boards were installed. We do not find a labor item charged to Thomas that is reconcilable with that item and accordingly conclude it is accounted for in the over-all payment of $419.70 to Thomas.

It follows that what plaintiff is trying to do here is to subtract costs actually incurred by Thomas in repairing the truck from the amount paid for damages arising from the collision, and contending that the difference is an illegal overcharge. Obviously an overcharge is not established by that method.

If we accept plaintiff's premise that the charges for parts and labor in the estimate are to be related in gross to the charges for parts and labor made to Thomas, then we would necessarily reach the result that Thomas, and not the plaintiff, was overcharged, or that if Thomas was charged the correct amount, plaintiff was undercharged. The estimate shows $720 for parts. Subtract-

ing from that the "freight" item of $100 and $225 for tires and tubes, the result would be $395 for parts put or to be put on the truck. The Thomas bill shows that he was charged $395.40 for parts before the discount was allowed. The estimate shows $458.15 for labor. Deducting from that the $45 labor item for painting leaves $413.15. The evidence shows that Thomas was charged $428.50 for labor performed. The net estimate in neither instance is as much as the charge to Thomas. Of course, this does not show that Thomas was overcharged or plaintiff undercharged, but rather shows the lack of a reconcilable basis for plaintiff's claim.

Summing up, plaintiff takes the amount which he, in effect, paid to Thomas for damages to his truck, subtracts from that the amount of the actual cost to Thomas of an incomplete repair job, and holds that the difference was an overcharge by defendant. We know of no rule of law or reason that sustains that conclusion.

The rule is: "Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit." Campbell v. Columbia Casualty Co., 125 Neb. 1, 248 N. W. 690. See, also, Rzeszotarski v. American Smelting & Refining Co., 133 Neb. 825, 277 N. W. 334.

The judgment of the district court is affirmed.

AFFIRMED.

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EINOT, INC., APPELLEE, V. EINOT SALES CO., INC., APPELLANT.
51 N. W. 2d 791

Filed February 15, 1952. No. 33004.

SUPPLEMENTAL OPINION

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. See 154 Neb. 760, 49 N. W. 2d 625, for original opinion. *Rehearing denied and original opinion adhered to.*

*Richards, Yost & Shafersman,* for appellant.

*Sidner, Lee & Gunderson,* and *Spear, Lamme & Flory,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

By motion for rehearing, among other contentions, the appellee contends substantially that this court was in error in that portion of the opinion wherein it is stated: "On January 3, 1951, attorneys for plaintiff received for and on behalf of plaintiff the $1,017.70 which had been paid into court for the benefit of plaintiff."

The basis of the contention is that this information is not legally authentically before the court, it not appearing in the bill of exceptions. The contention is a valid one and will be so recognized and the statement withdrawn. It will be pointed out however that in the original brief of appellant the subject was presented as authentically appearing and the appellee made no resistance thereto on the ground of lack of authenticity. The matter of receipt of the amount by the attorneys was not even responded to by attorneys for appellee.

The deletion of this sentence however does not affect the decision nor the remainder of the opinion. The record, as pointed out in the opinion, discloses that after declaration of and action for forfeiture the appellee accepted or at least retained certified checks for subsequent payments coming due under the contract. As pointed out in the former opinion this amounted to a waiver of the right of appellee to forfeit the contract.

With the deletion mentioned the motion for rehearing is overruled and the original opinion adhered to.

REHEARING DENIED AND ORIGINAL OPINION ADHERED TO.

FERN GARNETT PARKER, APPELLANT, V. IRVEN C. PARKER, APPELLEE.

51 N. W. 2d 753

Filed February 15, 1952. No. 33029.

1. **Divorce.** A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case.
2. ———. A general rule by which to measure the exact amount or degree of corroboration required in a divorce case cannot be formulated, and each case must be determined upon its facts and circumstances.
3. ———. Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such a character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or towards whom they are directed, or be such as to destroy the objects of matrimony.
4. ———. The court in deciding the amount of alimony or in making a division of property in a divorce case will consider the ages of the parties, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, the physical condition of each, the property owned by them, and whether or not it was acquired by their joint efforts, and any other pertinent facts.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Affirmed as modified.*

*Crosby & Crosby*, for appellant.

*Beatty, Clarke, Murphy & Morgan*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an action of divorce instituted by appellant on the ground of extreme cruelty inflicted upon her by appellee. He denied the charges of appellant and by cross-action sought a divorce from her on the claim that she had practiced extreme cruelty on him. The district court granted appellant a divorce, adjusted the

rights of each in the property accumulated by them during the marriage, reserved the matter of the custody of the minor children of the parties, dismissed the cross-petition of appellee, and denied the separate requests of the parties for a new trial.

The appellant complains that the award of money and property to her is legally unfair and inadequate, and that an insufficient amount was allowed by the court as compensation of her counsel. Appellee by cross-appeal presents the contentions that the evidence did not authorize the grant of a decree of divorce to appellant; that the proof entitled appellee to a divorce; and that the amount of property and money decreed to appellant is excessive.

The petition on which this case was heard and decided alleged generally that appellee had been guilty of acts of extreme cruelty toward appellant during much of the married relationship of the parties, and specifically that he had on many occasions urged appellant to remove from their home; that he did not desire to live with her; that he had no affection for her; that he was enamored with another woman; that his conduct had been cruel toward appellant; and that he had subjected her to the ridicule of her friends and neighbors. Appellant also charged that about the first of April 1950, appellee told appellant he would no longer live with her in their home; that he had a woman in North Platte that loved him; and that he then left the home of the parties and has not since offered or desired to return to and resume the marriage status with appellant.

The parties were married August 27, 1928. The age of each was about 20 years. They resided on farms and later on a ranch. They were hard-working, thrifty, and economical. They had very little assistance. Their farming operations were considerable, and grew and enlarged until the farming and ranching done by them was quite extensive. Appellant did the home work, cared for the children, kept a good home, and did many

kinds of work outside the home. She raised chickens, made and cultivated a garden, milked cows, attended the chores, and gave her attention and efforts to whatever there was to do—"Seemed like there was always something for me to do." They accumulated 2,160 acres of land and a herd of cattle appropriate to their ranch operations; and acquired machinery, trucks, automobiles, and equipment. They reconditioned and added to the improvements on the land they acquired. They have three well-trained, affectionate, and obedient sons.

The record indicates the parties from the time of their marriage until about the end of 1949 devoted themselves to hard work in a determined persistent plan to acquire and pay for property, almost to the exclusion of many of the indulgences usual to even rural life; and that they had few diversions and very infrequent recreation. They had many unpleasant and sometimes violent disagreements. It is not necessary to detail or attempt to evaluate the situation during those years closely and deeply enough to fairly ascribe the greater degree of blame to either. The obvious fact is that the relationship of the parties as the time of their marriage lengthened became rapidly and increasingly less desirable than what it should have been.

Appellee entered the employ of Farm Service Company of North Platte commencing with January 1, 1950, and took over the operation of it February 1, 1950. Appellant and the sons of the parties remained on the ranch. Appellee returned to the ranch generally each night and supervised the work there until about April 1, 1950.

After appellee became employed in North Platte he stayed away from home more, and when he did return it was later at night or early in the morning. He neglected and disregarded appellant; he was quarrelsome with and abusive toward her; and he would agree to accompany her to places such as dinner at the home of a friend, would not appear at the agreed time, but would some-

times come hours later, and sometimes would not come at all. His defaults were unexplained. Appellant, at the request of appellee, went to Ogallala and stayed at the home of her sister for several days in the early spring of 1950. When she returned she met appellee in Sutherland and accompanied him from there to their home. He showed no interest in her and exhibited no affection for her. This was about April 1, 1950—the night of Good Friday. He then told her about the other woman; how she liked him; that she was in North Platte while he came after appellant; and that he was supposed to take the other woman home. When they reached their home about 10:30 or 11:00 p. m., appellee left. He did not explain where he was going. They have not associated as husband and wife since.

Appellee told appellant about the other woman, who is identified in the record as Mrs. Olson; and that he took her from her home to the place where she worked, and accompanied her to lunch and from her work to her home at the close of the day. About the first of June 1950, he told appellant he was going to take Mrs. Olson to Colorado, and he later told appellant that he and Mrs. Olson had made that trip. He told appellant that they had been in Lincoln in May of 1950. The appellant and her sister saw Mrs. Olson and appellee traveling together when appellee was returning from a trip to Sterling, Colorado. They also saw appellee and Mrs. Olson come out and leave a cabin of the Highway Motel in North Platte about 8 a. m. on October 22, 1950.

Appellee and a woman occupied a cabin of the Highway Motel the night of July 6, 1950. He signed the guest register at the motel: "Name: Mr. and Mrs. Red Parker; Address: North Platte; License Number: 15-4542; Car Make: Pont." The woman was not appellant. She was never at the motel with appellee. He was sometimes known as Red Parker. His automobile was correctly described on the register. Appellee was at this motel, and rented and occupied a cabin with a

woman on 19 different times during July and August of 1950.

Appellee told a witness that he met this woman at Mac's 30 Club; that she asked him if he would dance with her, and he did; that she said her husband was getting a divorce; and on that occasion they "cried on each other's shoulders." He told the witness about his keeping company with her, the fact that she was 22 years old, and that "sometimes he felt rather foolish with her." Appellee on the trial of the case admitted that he had been keeping company with Mrs. Olson; that he made a trip to Denver with her; and that he told his wife he had not been "chasing with a woman. I had been around with a certain girl." There is additional evidence of the association of appellee with Mrs. Olson that need not be stated.

Appellee contends that the corroborative evidence is not sufficient in this case. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case. § 42-335, R. S. 1943; Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126. But the doctrine in this jurisdiction is that a general rule by which to measure the exact amount or degree of corroboration required in a divorce case cannot be formulated, and each case must be decided on its facts and circumstances. Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508; Peterson v. Peterson, *supra*. The evidence of the misconduct of appellee constituting extreme cruelty towards appellant is sufficiently corroborated, and the trial court was correct in granting a decree of divorce to appellant and in denying the cross-petition of appellee. In Peterson v. Peterson, *supra*, this court said: "Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such a character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or towards whom they

are directed, or be such as to destroy the objects of matrimony."

Appellee claims that the amount of money and property awarded by the district court is excessive. The rule for determining the question of alimony or division of property between the parties to a divorce case is well settled, has been recently restated, and need not be here repeated. Strasser v. Strasser, *supra;* Brudevold v. Brudevold, 153 Neb. 545, 45 N. W. 2d 443; McNamee v. McNamee, 154 Neb. 212, 47 N. W. 2d 383. The parties to this case at the time of their marriage had very little property. Appellant had taught school and had accumulated a small amount of money. Appellee had a few items of personal property and some cash. They put their money in a common account and their other property was considered and treated as joint property. All of the property owned by them when the controversy in this case arose, except the new automobile purchased by appellant with money borrowed from her father, was the result of their joint efforts and accumulations during their marriage. The award made to appellant is not excessive.

The judgment of the district court assigns all the real estate and all the personal property incident thereto and kept thereon, except 50 head of cattle and 2 bulls and the household goods, to appellee. It sets over and assigns the 50 head of cattle and 2 bulls to appellant. She is not under these circumstances equipped to keep, handle, or dispose of the animals given her by the decree reasonably or advantageously.

The conclusion is that all provisions of the decree of the district court should be affirmed except the provision awarding to the appellant the sum of $33,000; that said amount should be and is increased to $44,750, and that it should be and is adjudged to be paid to appellant within 60 days from the date of the mandate issued in this case; that the 50 head of cattle and 2 bulls assigned to appellant by the decree of the district court should be

and they are assigned and set over to the appellee; and that the judgment should be and is accordingly modified, and as modified, it is affirmed.

Appellee should be and he is ordered to pay, as compensation for the counsel of appellant for all services rendered in and concerning the controversy involved in this case in the district court and in this court, the total sum of $3,000, or an amount in addition to that required by the district court of $1,750, and that the costs should be and they are taxed to appellee.

AFFIRMED AS MODIFIED.

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PAT ADAMS, THROUGH AND BY HIS FATHER AND NEXT FRIEND, LLOYD ADAMS, APPELLANT, V. VERNON WELLIVER, APPELLEE.
51 N. W. 2d 739

Filed February 15, 1952. No. 33064.

1. **Automobiles.** Our statutes contemplate not only the installation of warning devices on motor-propelled vehicles but that they shall be used opportunely by the drivers of such vehicles to apprise pedestrians and other drivers of the approach of an on-coming car. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case.
2. ———. It is the duty of the driver of an automobile to exercise reasonable care in its operation and, when pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated.
3. **Automobiles: Infants.** Until the driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults.
4. **Infants: Negligence.** The age when an infant during its minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury.

5. ———: ———. Whether or not an infant between nine and ten years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law.
6. ———: ———. What is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation.
7. Trial. The instructions to the jury in this case, when considered and construed together, fairly state the law applicable to the issues raised by the pleadings and proofs.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Affirmed.*

*Dryden, Jensen & Dier,* and *Smith Brothers,* for appellant.

*Johnson & Stuart,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This action for damages was brought in the district court for Dawson County by Lloyd Adams, father and next friend of Pat Adams a minor, against Vernon Welliver, defendant, to recover for personal injuries sustained by the minor when he came in contact with the defendant's automobile at an intersection crossing in the city of Lexington. The cause was tried to a jury, resulting in a verdict for the defendant. The plaintiff filed a motion for new trial which was overruled. Plaintiff appeals.

For convenience we will refer to the minor Pat Adams as Pat, or the plaintiff; to the defendant, Vernon Welliver, as defendant; and to other persons, as occasion requires, by their proper names.

The pleadings of the parties necessary to be considered in this appeal may be summarized as follows. The amended petition of the plaintiff charges negligence on

the part of the defendant in the following respects: In operating his automobile at a high and excessive rate of speed, in excess of 25 miles an hour, and negligently failing to have the same under control; in failing to maintain a proper lookout for other persons on the highway at the time and place in question; in failing to operate his automobile so as to prevent the same from running into, upon, and against the body of the plaintiff; and of negligently failing to sound his horn or warn the plaintiff of his intention to turn west at the intersection of Washington and Fifth Streets which the plaintiff was crossing from the south to the north.

The answer of the defendant was a general denial, and affirmatively alleged that the sole and proximate cause of the injuries sustained by the plaintiff was due to the negligence of the plaintiff in running and placing himself in front of the defendant's moving automobile at a point on Fifth Street 45 feet west of the cross walk of the intersection, where pedestrians are not expected to be crossing.

The plaintiff's reply to the affirmative allegations of the defendant's answer was a general denial.

The record discloses that Pat Adams, a minor 9 years of age, and his brother Darrell Adams, 13 years of age, were given some spending money by their father, Lloyd Adams, on Saturday evening, June 24, 1950, and were granted permission by their parents to go up town in Lexington to spend it. The evening was warm and pleasant. There was a large crowd in the city and the diagonal parking spaces on both the north and south sides of Fifth Street were filled with parked automobiles, as apparently was the case on Washington Street also. In this situation the driveable distance between parked cars north and south on Fifth Street is 28 feet.

The boys decided to visit some friends who lived west on Fifth Street in the city. They visited for a few minutes, then they proceeded east on the sidewalk on the

south side of Fifth Street to the intersection of Washington and Fifth Streets.

Washington Street, referred to as the main street of the city, runs north and south and is paved. Fifth Street runs east and west and consists of bare brick paving. On the southwest corner of the intersection is McKee's Jewelry Store. Directly across the street north is the City Bakery. The distance from curb to curb, north and south on Fifth Street, is 56 feet. The cross walk across the west side of the intersection and the sidewalk on the west side of Washington Street is 11 feet 8 inches wide.

When the boys arrived at the corner near McKee's Jewelry Store they stopped and waited for a car that blocked their way to pull out. This car went east on Fifth Street, then south on Washington Street. The boys then started north across the intersection with Pat a short distance in front of Darrell in the intersection cross walk. Pat saw a car, which later developed to be the defendant's car, which had proceeded south on Washington Street and was turning the corner west onto Fifth Street, going fast. He started to run in a northwesterly direction, saw the lights of the defendant's car coming around the corner, and did not have time to stop and let the defendant's car pass in front of him. His brother Darrell stepped back a step or two and remained on the cross walk. He was uninjured. Pat had run five or six steps when the right front wheel of the defendant's car came into contact with him. He was on the right front side of the defendant's car which knocked him down and ran over his legs.

Pat's testimony, in most respects, is corroborated by Darrell. Darrell testified that he stepped back and defendant's car passed in front of him, that he said nothing to Pat at the time, and neither did Pat say anything to him. Pat then started to run. He did not corroborate Pat's testimony that Pat was not running very fast, but testified that he was running fast.

A witness standing at the northwest corner of the intersection near the City Bakery testified that she was going to cross the intersection to the south but stopped to permit defendant's car to get around the corner from Washington Street to proceed west on Fifth Street. She saw the Adams boys standing in the middle of the street where they had stopped to let a car pass in front of them. This car had pulled out from the parking space on the south side of Fifth Street. After this car had passed the boys, Pat started to run in a northwesterly direction, and Darrell stepped back. The defendant's car was turning the corner of the intersection west on Fifth Street at a speed of 30 miles an hour. Pat was not running too fast. He was "zipping" along, and he was not on the cross walk but had deviated from it. This witness did not see the accident, but testified if Pat had continued straight ahead he would not have been hit by the defendant's car, and that he was a little more than halfway across the intersection when he deviated from the cross walk in a northwesterly direction.

A police officer testified that the accident happened about 9:30 p. m. He arrived at the scene of the accident 10 or 15 minutes thereafter and proceeded to investigate and take certain measurements. By measurement he determined it was 43½ feet from the west curb on Washington Street to where Pat was lying when he arrived. It was 31½ feet from where Pat was lying on the pavement west from the west boundary of the cross walk across Fifth Street. He prepared a sketch which showed that Pat was lying behind the third parked automobile on the north side of Fifth Street west of the intersection. Fifth Street is 57 feet 10 inches wide from curb to curb, north and south. There is a stop sign on Fifth Street, requiring automobiles to stop before entering Washington Street. The overall width of the parking spaces north and south on Fifth Street is 16 feet 10 inches. There were no skid marks or brake

marks, nor any signs that the defendant's automobile had come in contact with any object. When this witness found Pat, the defendant's car was directly parallel with the supporting pole of the stairs that lead to the second floor of the City Bakery, and was directly behind the third parked car on the north side of Fifth Street west of the intersection. Measurements made by Pat's father indicate that the distance from the west side of the cross walk west to the center of the third parked car on the north side of Fifth Street is 27 feet.

The defendant testified that he and his wife were down town on the evening the accident occurred and had attended a moving picture show. Just prior to the accident he was driving his 1938 Ford sedan south on Washington Street, and between Fifth and Sixth Streets he was proceeding at a speed of 10 miles an hour. There were other cars in the same traffic lane and also cars moving in the opposite direction. He stopped in front of Wisda's Hardware Store, the first building north of the City Bakery on Washington Street, for the reason that there was a car stopped across the cross walk. Before he turned west on Fifth Street there was no one on the cross walk and he was not required at that time to stop for pedestrians to pass. After he rounded the corner west on Fifth Street he felt a thump. He did not know what it was, and did not see Pat. The lights were burning on his car, and his brakes were good. He was traveling at a speed of between 5 and 10 miles an hour and had driven 40 to 45 feet west on Fifth Street when he felt the bump. He immediately applied his brakes and stopped his car within a distance of 5 feet. He then got out and investigated the accident to determine what he had struck.

It appears by the evidence that Pat was lying under the right front wheel of the defendant's car. His head, shoulders, and the upper part of his chest were under the running board of the car, and the remainder of his

body and legs were extending from under the car toward the north curb.

The defendant's wife corroborated his testimony with reference to the rate of speed he was traveling. She was unaware that defendant's car had come in contact with an object. She testified that defendant was generally looking for rattles in his car, and when he stopped she thought he was making an investigation of that nature. She did not leave the car.

A man and his wife, residents of Cozad, on the evening in question entered Lexington on Fifth Street and proceeded east thereon to the intersection of Fifth and Washington Streets. There were two cars ahead of them proceeding in an easterly direction. The second car ahead of them stopped at the stop sign. There were two boys standing on the south side of Fifth Street at the intersection. One little boy started out, hesitated, then darted out in front of the second car ahead of their car. There was a car coming from the north on Washington Street, turning the corner west onto Fifth Street, with its lights on, driving between 5 and 10 miles an hour. They saw Pat's head from the lights in front of this car, then the defendant's car stopped instantly. This testimony further disclosed that Pat was struck approximately when he was ahead of and about at the center of the front of the defendant's car. The impact between the defendant's car and Pat seemed to throw him forward, or he fell forward. Defendant's car was slightly east and north of these witnesses' car which was stopped at the time of the accident.

The doctor who examined Pat testified that he had a fracture of the right leg, no internal injuries, and no contusions or abrasions on the left leg or other parts of his body.

The plaintiff assigns as error that the verdict of the jury and the judgment of the court entered thereon is not sustained by the evidence and is contrary to law; that the trial court committed prejudicial error in not

instructing the jury on the provisions of the Nebraska statutes with regard to the duty of an automobile driver to sound the horn on his automobile as a warning to pedestrians as provided by section 39-7,115, R. S. 1943; that the trial court committed prejudicial error in refusing to give instruction No. 2 requested by the plaintiff; and that the trial court prejudicially erred in giving instruction No. 4 on contributory negligence and instruction No. 12 on comparative negligence.

The plaintiff relies on the case of Christoffersen v. Weir, 110 Neb. 390, 193 N. W. 922, as being in point on the duty of the defendant in the instant case to sound his horn. The court there held: "It is the duty of the driver of an automobile to exercise reasonable care in its operation, and where pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated." The court further held that the statute then in force "contemplates, not only the installation of warning devices on motor-propelled vehicles, but that they shall as well be used opportunely by the drivers of such vehicles to apprise pedestrians and other travelers of the approach of an oncoming car." See, also, Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499, to the same effect.

The duty of a motorist to sound a signal warning of his approach depends largely on the circumstances of the particular case. See, Tews v. Bamrick, *supra;* Kauffman v. Fundaburg, 123 Neb. 340, 242 N. W. 658.

A driver of an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles or pedestrians, assuming that the drivers of the other vehicles and pedestrians exercise due care. Reasonable control by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in the streets or intersections, and with pedestrians in the exercise of due care; but complete control such as will only prevent a collision by anticipation of negligence or

illegal disregard of traffic regulations, in the absence of notice, warning, or knowledge, is not required by the laws of Nebraska. See, Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436; Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767.

We believe that under the evidence no question of negligence can attach to the defendant in failing to sound his horn under the circumstances of this case. He was not bound to anticipate that Pat would suddenly and unexpectedly leave the direct line of travel on the cross walk of the intersection, dart forward, and run diagonally in a northwesterly direction in front of his car after he had turned the corner and was proceeding west on Fifth Street. In such a situation defendant's failure to sound the horn had no relationship to the cause of the accident, and therefore was no part of the proximate cause thereof. There is competent evidence by which a jury could determine the situation came about so suddenly that it was, as a matter of fact, impossible for the defendant to respond. The trial court did not err in failing to instruct the jury with reference to the duty of the defendant to sound his horn, as contended for by the plaintiff.

There is no evidence that the defendant's car was not under control in the sense that the law requires. It was stopped within five feet after Pat was struck, a fact indicating that the driver was alert and acted in a prompt manner. See, De Griselles v. Gans, 116 Neb. 835, 219 N. W. 235; Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613.

This brings us to the proposition as to whether or not the trial court erred in instructing the jury on contributory negligence and on comparative negligence.

In Armer v. Omaha and C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607, this court held: "The age when an infant during his minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by

arbitrary rule, and generally is a question of fact for the jury. * * * Whether or not an infant between 11 and 12 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law." In the body of the opinion the court said: "The appellant was about three months past 11 years of age, and cannot be charged with the degree of caution required of an adult in guarding against possible accidents while traveling upon and crossing a street in a city. There is no arbitrary rule fixing the time at which a child during its minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such an activity. It is generally considered that such a question is one of fact to be decided by a jury. Whether or not negligence may be attributed to a child of such tender years is usually a matter for a jury under the circumstances of each case. It is only in an extreme situation where the facts show plainly knowledge and appreciation of the danger to be incurred, if certain action is had, that a court may decide as a matter of law that a child of such an age was guilty of negligence, or that his act or omission was the proximate cause of the happening in question. It was a question for the jury whether or not the appellant, a child slightly more than 11 years of age, was or could be negligent, and whether or not any act or omission on her part was the proximate cause of the collision." See, Tews v. Bamrick, *supra;* Kauffman v. Fundaburg, *supra.*

In Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N. W. 883, this court held: "As a general rule, whether a child of 11 years of age is of sufficient knowledge, discretion and appreciation of danger that it may be held guilty of contributory negligence is a question for the jury to determine." The court, in the opinion, said: "The general rule is that whether contributory negligence may be attributed to a child of such tender

years is a matter for the jury under all the circumstances of each case."

In De Griselles v. Gans, *supra,* it was held: "Until a driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults."

In the last cited case this court determined that the action of the 9-year-old child was the proximate cause of his death and no recovery could be had against the defendant in any event. There appears in the opinion the statement "The plaintiff's decedent, on account of his tender age, is not chargeable with contributory negligence, * * *." However, this was not a question in the case.

The cases determined by this court which hold that an infant of tender years is not chargeable with contributory negligence appear to be cases where the infant is shown to be 7 years old or less, and where the evidence discloses the infant did not possess sufficient knowledge, discretion, and appreciation of the danger that he might be subject to the defense of contributory negligence. As stated in Armer v. Omaha & C. B. St. Ry. Co., *supra,* "There is no arbitrary rule fixing the time at which a child during its minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered * * *." The court went on to say "What is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation." See cases cited in the opinion. See, also, 38 Am. Jur., Negligence, § 205, p. 888; 65 C. J. S., Negligence, § 146, p. 788.

The evidence discloses that Pat Adams was 9 years and a little more than 3 months of age at the time of the accident. From his testimony it is apparent that he was

an intelligent boy, in the fourth grade at school. He testified that he was "scared" when he started to run, but continued to do so. There is competent evidence from which a jury could determine that Pat possessed sufficient knowledge, discretion, and appreciation of danger to be able to avoid it, as an ordinary prudent child of the same capacity to appreciate danger and seek to avoid it would do in the same situation. Under the authorities heretofore cited, we believe it was a question for the jury to determine whether or not, under the circumstances of the case, Pat Adams was guilty of contributory negligence.

This brings us to the question of whether or not the trial court committed prejudicial error in failing to give instruction No. 2, requested by the plaintiff. This instruction is as follows: "You are instructed that 'the law required of those driving in the presence of children such care as is commensurate with the danger reasonably to be anticipated from possible erratic acts of such children. In this respect defendant was required to exercise ordinary care. The standard of care established by the law is what an ordinarily careful and prudent person would do under existing circumstances. One driving in the presence of children, in order to meet the standard of ordinary care, may be required to put forth a greater degree of effort or precaution than under ordinary conditions. It is for you to determine what the defendant's conduct should have been under the circumstances, as shown by the evidence, and whether he failed to exercise ordinary care.' "

In instruction No. 8, the trial court instructed the jury as follows: "A motorist who observes or should reasonably anticipate the presence of children in the highway is obliged to use reasonable care in view of all the circumstances. Such a motorist should realize that not all children exercise the same prudence and judgment of experienced persons and that some of them might do impetuous or thoughtless acts. He is not re-

quired to insure the safey of a child or to prevent the injury of a child at all costs. It is for the jury to determine the amount of care which a reasonable prudent person should have exercised under the circumstances and in view of the amount of danger which should have then been anticipated. The failure to use such amount of care constitutes negligence."

Instruction No. 8, heretofore set out, embodies in it everything that is contained in the requested instruction of the plaintiff, and is a correct statement of the law. See, Tews v. Bamrick, *supra;* Armer v. Omaha and C. B. St. Ry. Co., *supra.*

The instructions to the jury in this case, when considered and construed together, fairly state the law applicable to the issues raised by the pleadings and proofs. See, Barton v. McKay, 36 Neb. 632, 54 N. W. 968; O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

We conclude that the verdict of the jury and the judgment entered thereon by the trial court are correct and should be, and are hereby, affirmed.

AFFIRMED.

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HENRY E. DINGWERTH, APPELLANT, V. FRANK ASSENDROP, APPELLEE.
51 N. W. 2d 756

Filed February 15, 1952. No. 33065.

1. **Deeds: Mortgages.** A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage.
2. **Frauds, Statute of.** Oral agreements for the sale of lands are void on their face as within the statute of frauds because not in writing, even though proved by clear and satisfactory evidence, unless there has been part performance by the promisee which is solely referable to the contract sought to be established and not such as might be referable to any other contract or situation.

APPEAL from the district court for Howard County: ERNEST G. KROGER, JUDGE. *Affirmed.*

*Dobry & Dobry, Thomas W. Lanigan,* and *Cunningham, McDermott & Cunningham,* for appellant.

*Haggart & Haggart,* and *Harold A. Prince,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This action was brought in the district court for Howard County by Henry E. Dingwerth against Frank Assendrop. The action was brought for the purpose of requiring the defendant to specifically perform an alleged oral promise that he would, upon certain conditions being performed by plaintiff, reconvey to the plaintiff certain real estate located in Howard County. Trial was had and, at the close of plaintiff's testimony, the trial court sustained defendant's motion for judgment and dismissed the action. Plaintiff filed a motion for new trial and, from the overruling thereof, took this appeal.

The lands involved are described as follows: "The east half of the Southwest quarter (E½ SW¼) and West sixty (60) acres of the Southeast quarter (SE¼) of Section seven (7), and also the Northeast quarter (NE¼), except the East half of the East half thereof, of Section eighteen (18), all in Township thirteen (13) North, Range Nine (9), West of the 6th principal meridian, in Howard County, Nebraska, * * *."

This action was commenced on July 14, 1950. It is equitable in its nature. The record discloses that appellant bought the 260-acre farm herein involved in 1926, and he and his family moved onto it in 1927. He bought it for $32,000 and subsequently, while still the owner, put on improvements costing about $2,500.

Appellant borrowed money from appellee and on December 1, 1933, gave appellee a note of $9,000 evi-

dencing the indebtedness and also a first mortgage on the above-described lands as security therefor. The note was due in five years and provided for interest to be paid on the principal at five percent per annum. On April 26, 1938, none of the principal had been paid nor had any interest been paid thereon. At that time the interest on the obligation amounted to over $1,950. In addition the appellant had not paid the taxes on the premises for the last half of 1936 and all of 1937. Just what these amounted to is not definitely shown but apparently it was somewhere between $122.64 and $162.24.

Because of these delinquencies appellee threatened appellant with foreclosure. As a result of negotiations resulting therefrom the appellant and his wife, on April 26, 1938, conveyed the lands to appellee. As consideration for the conveyance the mortgage obligation was canceled and the mortgage released, appellant was given a lease of the premises for the year 1938 free of any charges for rent, and, in addition thereto, appellee paid appellant $200.

During the years following the execution and delivery of the deed appellee paid all taxes assessed and levied on the lands, kept the buildings insured, caused improvements and repairs to be made for which he paid, and, in general, treated the land as his own and the appellant as his tenant. It is significant that during these same years appellant treated the appellee as his landlord and occupied the farm as his tenant paying rent to the appellee for the use thereof in excess of $14,650 during the ten years following 1938 for which he asks no accounting.

In his amended petition appellant sets forth the oral promise upon which he relies, and which he claims was an inducement for the execution of the deed, as follows: "That in pursuance of the discussions had between the plaintiff and defendant aforesaid, a few days before the 26th day of April, 1938, defendant came to plaintiff's home and informed plaintiff that he had a proposition

to make to the plaintiff so that it would not be necessary to foreclose the mortgage and submitted the following offer to the plaintiff, to-wit: * * * that the defendant would deed the farm back to the plaintiff whenever the plaintiff was able to pay the principal, interest and taxes then due, at any time during their lifetime; * * *."

Appellant testified appellee said: "'You deed the farm to me and I'll deed it back to you any time you can pay me, * * *.'"

Appellant's evidence, both offered and received, tends to prove that during the negotiations leading up to the deed of April 26, 1938, that appellee promised that if at any time appellant could pay him what he then owed he would deed the farm back to him. It is this oral promise to let appellant repurchase the lands which appellant here seeks to enforce.

The factual situation is the same as was involved in Winkelmann v. Luebbe, 151 Neb. 543, 38 N. W. 2d 334, and what was therein held is here controlling.

The principles therein announced are as follows:

"If a deed is in fact intended as a mortgage and only given as security for a debt such an agreement is enforcible and may be established by parol evidence but it must be established by evidence that is clear, satisfactory, and convincing.

"A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage.

"Oral agreements for the sale of lands are void on their face as within the statute of frauds because not in writing, even though proved by clear and satisfactory evidence, unless there has been part performance by the promisee which is solely referable to the contract sought

to be established and not such as might be referable to any other contract or situation."

No such part performance as would take the case out from under the statute of frauds has either been alleged or proved. We therefore come to the conclusion that the judgment of the trial court is correct and it is therefore affirmed.

AFFIRMED.

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ESTHER M. DOLEN, APPELLEE, V. HOWARD B. DOLEN, APPELLANT.
51 N. W. 2d 734

Filed February 15, 1952. No. 33094.

1. **Appeal and Error.** Exhibits which are introduced in evidence in the case, or excluded therefrom, must be brought before the reviewing court by being incorporated in the bill of exceptions if the action of the district court is to be reviewed.
2. ———. Where, upon the inspection of a bill of exceptions, palpable omissions appear, as that certain exhibits introduced with reference to the defense of res judicata are not incorporated therein, the reviewing court will not pass upon the sufficiency of this evidence to determine the validity of such a defense.
3. **Divorce.** In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto; and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Affirmed.*

*James A. Hayward,* for appellant.

*John H. Binning,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is a divorce action brought by Esther M. Dolen as plaintiff against Howard B. Dolen as defendant in the district court for Lancaster County. Trial was had to the court. The court entered judgment granting the plaintiff an absolute divorce, and made a division of the personal and real property owned by the parties. The plaintiff, by motion, moved the court for an order setting aside the decree entered by the court on June 16, 1951, and requested the court to enter a decree adjudging the plaintiff to be the equitable owner of the real estate involved in this action. The defendant, by motion, moved the court to set aside the decree and dismiss the action for the reason that all the matters set forth in the pleadings of the plaintiff had been previously adjudicated by a former action. The trial court overruled both motions. The defendant appealed from the overruling of his motion to set aside and vacate the decree entered by the trial court on June 16, 1951.

It appears from the transcript that on August 12, 1949, the plaintiff filed suit for divorce against the defendant in the district court for Lancaster County. In her petition she charged the defendant with nonsupport. She also alleged that since the marriage the parties had accumulated certain personal property, and the plaintiff had accumulated a house and some lots. The plaintiff prayed for a divorce from the defendant, that title to the real estate described in the petition be quieted in her, and that she be given such personal property as to the court seemed just and equitable. The defendant,

by answer, denied the allegations of the plaintiff's petition with reference to nonsupport, and, by cross-petition which is in effect an answer, pleaded certain facts with reference to the real estate owned by the parties, claiming an interest therein. The answer of the plaintiff to the cross-petition and reply to the answer of the defendant is a general denial and prays for the dismissal of the defendant's cross-petition. Trial was had before the court, and after the evidence was adduced the court entered judgment that the evidence was insufficient to establish the fact that defendant willfully, wantonly, or cruelly failed to provide support for the plaintiff, and dismissed the plaintiff's petition at plaintiff's costs. The plaintiff filed a motion for new trial which was overruled. No appeal was taken from this judgment.

On March 11, 1950, the plaintiff filed an action for divorce against the defendant in the district court for Lancaster County, alleging that the defendant, since the date of the marriage and particularly during the last ten years, had treated the plaintiff with extreme cruelty and in such a way as to destroy the legitimate objects of matrimony; that the defendant had openly and notoriously consorted with other women; and failed to provide for or support the plaintiff. Plaintiff prayed for an absolute divorce, title to the real estate owned by the parties, and a division of the personal property as the court would judge just and equitable. The defendant moved to dismiss the action, which was overruled. The defendant filed an answer and cross-petition, which is in effect an answer, denying generally the allegations of the plaintiff's petition charging extreme cruelty and consorting with other women. The following is alleged in the purported cross-petition: This cause was tried before Judge Ankeny in the district court, and the court held that no nonsupport had been proven, also, that from the evidence no extreme cruelty had been proven or admitted and therefore found for the defendant. The defendant prayed dismissal of the plaintiff's

petition for the reason that all matters contained therein were res judicata, having been completely gone over in the former petition filed by the plaintiff, heard in the court, and decided theretofore. On June 24, 1950, the court entered judgment granting the plaintiff an absolute divorce from the defendant on the grounds of extreme cruelty. The court found that the plaintiff and defendant owned jointly Lots 19, 20, and 21, Block 3, S. H. Irvine's Second Addition to Lincoln, Lancaster County, Nebraska, commonly described as 1709 North 29th Street; that liens existed against the real estate resulting from judgments obtained against the defendant; that each party would own an undivided one-half interest in the real estate subject to all liens and encumbrances existing against the property; and gave all of the household goods to the plaintiff, and two horses in the defendant's possession to him, together with a Chrysler automobile of which he had possession. Defendant was to pay plaintiff's attorney's fees and costs of the action. The defendant filed a motion for new trial. The primary reason given therein was that there had been a previous adjudication of the matters alleged in the plaintiff's petition which was tried to the district court in a former trial. The plaintiff filed a motion for new trial on the ground that the judgment was contrary to law concerning the disposition of the property of the parties. The trial court entered an order sustaining both the defendant's and plaintiff's motion for new trial, and vacated the decree entered by it on June 24, 1950.

On June 16, 1951, the trial court entered a decree and judgment in substance as follows: It was determined at the trial that the petition of the plaintiff filed in book 177, page 144, of the records of the district court for Lancaster County should be treated as an amended petition in a case filed in book 175, page 113, both cases being entitled as Esther M. Dolen v. Howard B. Dolen, docket 177, page 134. The court then found generally in favor of the plaintiff and that the defendant was

guilty of extreme cruelty to the plaintiff and of adultery which entitled the plaintiff to an absolute divorce from the defendant. The court further found that the plaintiff and defendant were joint owners of the real estate which has been heretofore described; that there were liens existing against the real estate resulting from judgments obtained against the defendant; and that the real estate should be divided, the plaintiff to own 60 percent of the same and the defendant to own 40 percent of the same as tenants in common, subject to all liens and encumbrances then existing of record against the real estate. The court retained jurisdiction to appoint a referee and order a sale of the property and distribution of the proceeds after payment of the liens thereon. The court made no disposition as to the liability of the parties for taxes which might be due or which might arise, or for the payment of insurance, upkeep, and the like. The court gave the plaintiff all of the household goods, awarded the defendant two horses of which he was then in possession, and ordered the defendant to pay the attorney's fees of the plaintiff and costs of the action. Judgment was entered in accordance with the findings. The plaintiff filed a motion to set aside the decree entered by the trial court on June 16, 1951, as being contrary to law and equity in that plaintiff was the equitable owner of the real estate and was entitled to have the title of the same quieted in her as against the defendant. The defendant filed a motion to set aside the decree and dismiss the action, the principal ground therefore being that there had been a previous adjudication of all the matters raised in the pleadings of the plaintiff at a former trial. Both the motions of the plaintiff and of the defendant were overruled. Defendant perfected appeal to this court.

It appears from the record that the plaintiff and defendant were married at Lincoln, Nebraska, on August 16, 1920. They are the parents of three boys now adults, not dependent upon them for support. The plaintiff

lived in the house which they purchased in 1941 as co-owners with a $300 down payment. The defendant raised $200, and the seller of the property loaned the other $100 to constitute the down payment. The latter $100 has not been repaid, $30 being the amount paid on the principal debt, and $5 interest. The plaintiff has been employed at a local general merchandising store for a period of 17 years. When she started her employment she received the sum of $12 a week. There was an arrangement between herself and the defendant that he was to furnish the family with support and she was to make the payments on the home. It appears that she did so, with the exception that on three or four occasions the defendant made certain payments. The evidence is not clear as to just how many payments or the amount thereof that defendant did make on the home. The plaintiff and defendant have not lived together as husband and wife for a period of at least six years. They each have their own rooms and neither occupies the room of the other on any occasion. The plaintiff prepares her own meals, procures her own essentials, and washes and irons the linens and towels for the defendant's room. The defendant procures his meals outside of the home, and both come and go as they please without consulting or interfering with the other. They have nothing in common.

The plaintiff relates in her testimony certain cruel treatment on the part of the defendant during their married life, and that the defendant had sold intoxicating liquor to certain persons when they lived in apartments and subsequently from the basement of the home which they purchased. This continued during 1942, 1943, and at other times. The defendant was of a nervous temperament and the least agitation caused him to use abusive language toward the plaintiff. During January 1946, the defendant moved certain household goods and furniture into the basement of the home, and certain clothing belonging to another woman which he

hung in the closet in his room. This contributed to the plaintiff's unhappiness and made her nervous.

There is evidence that the plaintiff in no event would effect a reconciliation with the defendant and refused to accept any support that he would offer her. In addition, there is evidence to the effect that the plaintiff had the utility bills for the household placed in her name and a separate telephone installed which she testified was placed in the house at the instigation of one of her sons. The telephone in the home placed there by the defendant was at various times disconnected.

It also appears from the record that the defendant was seen by neighbors on various occasions in and near the premises occupied by a married woman; that certain furnishings in the home were purchased by him, of which he claimed to be the owner; and that he paid household bills and exercised control and dominion over the home. On or about February 5, 1946, police officers, in making an investigation to locate certain stolen intoxicating liquor, proceeded to this house and contacted the defendant who informed them they would be required to obtain a search warrant to search the premises, and questioned their jurisdiction to do so. Subsequently he permitted the search in which intoxicating liquor was found cached in the basement of this home. It is obvious that he was consorting with a married woman and, in addition, was also an occupant of the home. Subsequently this woman left the city and joined her husband and children.

It also appears from the record that on behalf of the defendant there was offered in evidence docket 173, number 167, case entitled Esther M. Dolen v. Howard Ben Dolen, filed August 12, 1949, the first petition in divorce filed in this case. This included the whole record which was determined to be all of the pleadings in the case and the decree entered by Judge Ankeny. There was also a motion, after the same served its purpose, to withdraw it and leave it with the clerk of the

district court. Objection was made on the ground that it was irrelevant and immaterial, which was overruled.

The defendant contends the trial court erred in overruling his motion at the close of the plaintiff's evidence to dismiss the plaintiff's cause of action. This assignment of error is based upon the doctrine of res judicata, that is, that all of the matters pleaded by the plaintiff and testified to in the instant case have been adjudicated by a former action between the same parties involving the same subject matter in the district court for Lancaster County, as heretofore appears.

None of the pleadings in the case of Esther M. Dolen v. Howard Ben Dolen, filed August 12, 1949, are incorporated in the bill of exceptions. However, the petition, answer and cross-petition, answer to cross-petition and reply to answer, order dismissing petition, motion for new trial, hearing thereon, and order overruling motion for new trial appear in the transcript in the instant case. There is nothing in the record, by stipulation or otherwise, that exhibits appearing in the transcript are a part of the bill of exceptions or that reference should be made to them as evidence in the bill of exceptions.

"Where, upon an inspection of a bill of exceptions, palpable omissions appear, as that certain exhibits introduced are not incorporated therein, the reviewing court will not pass upon the sufficiency of the evidence to sustain the finding below." Scott v. Society of Russian Israelites, 59 Neb. 571, 81 N. W. 624. In the body of the opinion the following appears: "It is next insisted that defendant is estopped from claiming the invalidity of these taxes, by reason of an alleged former adjudication in a cause between the parties. The court below made no finding on this issue tendered by the reply, and this court is unable to pass upon the question, for the reason that certain exhibits introduced in evidence on the trial are not incorporated in the bill of exceptions.

In view of this fact, it can not be determined whether a prior adjudication was established or not."

Exhibits which are introduced in evidence in the case, or excluded therefrom, must be brought before the reviewing court in the record if the action of the lower court is to be reviewed. 3 Am. Jur., Appeal and Error, § 591, p. 223, and cases cited under note 15 thereof on page 224.

In 4 C. J. S., Appeal and Error, § 738, p. 1216, it is said: "It is generally held that exhibits are not part of the pleadings, and, to be made a part of the record on appeal, must be contained in a bill of exceptions or some substitute therefor." See, also, Darlington v. State, 153 Neb. 274, 44 N. W. 2d 468, and cases cited therein.

In this jurisdiction cases too numerous to cite hold that where an assignment of error relates to purported evidence which does not appear in the bill of exceptions, such assignment of error will not be reviewed or determined in this court. We conclude the issue of res judicata as contended for by the defendant is not before this court to be determined.

We review the sufficiency of the evidence in the instant case to determine whether or not the trial court erred in granting the plaintiff an absolute divorce and making a division of the real and personal property owned by the parties. There was no evidence introduced by the defendant to contradict the evidence introduced by the plaintiff. We deem it sufficient to affirm the trial court's judgment in granting the plaintiff an absolute divorce and making division of the real and personal property of the parties.

The plaintiff cross-appeals, assigning as error that the trial court, in overruling the motion of the plaintiff made after the entry of the decree to set aside the same and failing to enter a decree quieting the title to the real estate in the plaintiff so that she would be the sole owner thereof, committed prejudicial error. We have heretofore reviewed the evidence with reference to the

payments made on the real estate by the plaintiff and defendant, and have also made mention of certain judgment liens which were caused by the defendant without knowledge of the plaintiff against the real property and total $1,733.43, without interest.

We are cognizant of the rule that it is well established in a divorce suit where the court has jurisdiction of the parties, it has the power to adjust all of their respective property interests. See, Sims v. Sims, 148 Neb. 771, 29 N. W. 2d 378; Johnsen v. Johnsen, 144 Neb. 208, 12 N. W. 2d 837.

In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto; and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just. See Brudevold v. Brudevold, 153 Neb. 545, 45 N. W. 2d 443.

We believe that, on a review of the record, the court made a just and equitable division of the property, both real and personal, owned by the parties. We conclude the judgment of the trial court in the division of the real estate is just and equitable.

While there is some indication in the defendant's brief that the plaintiff condoned the acts of extreme cruelty on the part of the defendant, there is no evidence

in the record to support condonation on plaintiff's part.

For the reasons given in this opinion the judgment of the trial court is affirmed.

AFFIRMED.

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VAYLE VONNE GERKINS KUHL, APPELLEE, V. SCHOOL DISTRICT NO. 76 OF WAYNE COUNTY, NEBRASKA, APPELLANT.
No. 33099.

RALPH M. FLUENT, APPELLEE, V. SCHOOL DISTRICT NO. 76 OF WAYNE COUNTY, NEBRASKA, APPELLANT.
No. 33100.

ARDITH MOFFETT, APPELLEE, V. SCHOOL DISTRICT NO. 76 OF WAYNE COUNTY, NEBRASKA, APPELLANT.
No. 33101.
51 N. W. 2d 746

Filed February 15, 1952.

1. **Judgments.** A judgment is not res judicata as to any fact at issue in subsequent actions where neither issues nor parties are the same.
2. **Schools and School Districts.** A contract to teach entered into by a school board with a teacher who does not qualify by certificate as required by law to teach in the particular type of district involved is invalid and unenforceable.
3. **Injunctions.** When an injunction is legally granted in a case where the court has jurisdiction of the subject matter and the parties, it must be respected and obeyed until it is set aside by the court allowing it, or it is reversed in the appellate court by some appropriate mode of direct review.
4. **Contracts.** A contractual duty or a duty to make compensation is discharged in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited by a judicial order made with due authority by a judge who has jurisdiction of the subject matter and the parties.

APPEAL from the district court for Wayne County: JACKSON B. CHASE, JUDGE. *Reversed and dismissed.*

*Budd B. Bornhoft,* for appellant.

*Mark J. Ryan* and *Joseph G. Rogers,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiffs filed three separate actions at law to recover upon their respective contracts to teach during the 1948-1949 school year, which contracts were allegedly executed and subsequently breached by the officers of defendant district, who wrongfully failed, neglected, and refused to open or conduct the school at any time during such year. Defense was that the contracts were invalid for failure to comply with certain alleged mandatory requirements contained in statutes then controlling, and that certain injunctive orders in full force and effect from August 30, 1948, until January 27, 1950, prevented defendant from opening and conducting a school during all of the period covered by the alleged contracts, and thus by operation of law excused performance thereof. In their amendments to replies, plaintiffs, among other things, also affirmatively alleged that they were "prevented from fulfilling" such contracts "because of the wrongful injunctive orders, wrongfully and illegally issued * * * copies of which * * * are attached to defendant's answer * * *."

A jury was waived, and the issues were tried to the court, after which it was found that the contracts were all valid, that the performance thereof was not excused by operation of law, and the court rendered separate judgments in favor of each plaintiff respectively, taxing costs to defendant. Motions for new trial were overruled, and defendant appealed each case separately, assigning that the judgments were not sustained by the evidence but contrary thereto and contrary to law. The three cases were consolidated by stipulation in this court for purposes of briefing, argument, and decision.

Thus in one opinion we sustain the assignments, concluding that the judgments were respectively contrary to law and clearly wrong.

The pertinent facts as disclosed by the record are either stipulated or undenied. They are as follows: In April 1948 the schoolhouse belonging to defendant district was destroyed by fire. Two buildings were then leased by unanimous action of the board in which school was held for the rest of that school year. No action was taken at the annual school meeting on June 9, 1948, with reference to leasing school buildings for the next school year, but thereafter, on July 20, 1948, the electors defeated a proposal to construct a new schoolhouse. Some disagreement arose between the board members regarding school facilities for the 1948-1949 school year, whereupon the moderator and director entered into an oral lease for the same buildings as theretofore leased, in which school was to open on September 6, 1948, for the 1948-1949 school year.

On August 12, 1948, the same moderator and director entered into the alleged contract with plaintiff Kuhl to teach elementary grades. She then held a third grade elementary certificate valid for that purpose in article 3 schools, as provided by section 79-1310, R. S. 1943. However, such certificate was not registered in the office of the county superintendent until September 9, 1948, after the alleged contract was executed, after school was supposed to open on September 6, and after the injunctive orders which prevented performance were in full force and effect.

Likewise, on August 13, 1948, such officers entered into the alleged contract with plaintiff Fluent to serve as school superintendent. He then held a certificate valid for that purpose which, however, was not registered in the office of the county superintendent until August 18, 1948, after the alleged contract was executed.

Likewise, on August 25, 1948, they entered into the alleged contract with plaintiff Moffett to teach elemen-

tary grades. She had previously taught in Dixon County schools, but her third grade elementary certificate, valid for teaching elementary grades in article 3 schools, had expired in June 1948 and at time of executing the alleged contract she had no certificate whatever. The blank space in such printed contract into which should have been written the type of certificate then held by her was for that reason left blank and still so appears. However, she attended summer school at Wayne State Teachers College and had earned credits sufficient to entitle her to renewal of her certificate. On August 28, 1948, she applied for such renewal. After some delay occasioned by the Department of Public Instruction such a certificate, antedated September 8, 1948, was received by her about September 22, 1948, and was registered in the office of the county superintendent on October 6, 1948, all of which occurred after the alleged contract was executed, after the time set for opening school, and after the injunctive orders preventing the same were in full force and effect.

Be that as it may, no school whatever was opened or held in defendant district during the 1948-1949 school year and its children attended neighboring districts. As affirmatively pleaded by both plaintiffs and defendant and as stipulated by them, the reason therefor and the reason for failure to perform the alleged contracts as well was "That defendant's school was not operated during the school year of 1948-1949 by reason of the injunctive orders" entered by courts of competent jurisdiction, which continuously enjoined the opening or conducting of any school from August 30, 1948, until final decision by this court in Griggs v. School District, 152 Neb. 282, 40 N. W. 2d 859, on January 27, 1950, which was more than six months after the teaching dates under the alleged contracts had expired.

In that connection, on August 30, 1948, one Ira O. Griggs, a taxpayer and resident elector of the district, filed an action in the district court in his own right

and on behalf of all persons similarly situated, against the district and its officers, to enjoin the expenditure of school district funds, the entering into of agreements in regard to operation of a school, changing the site of the school, and leasing a building for school purposes unless and until approved by the legal voters of the district.

On that date, in the absence of the district judges from Wayne County, the county judge issued a temporary restraining order, conditioned upon the execution of a $250 bond, restraining defendants and each of them from in any manner conducting a school, entering into any teacher contracts, and expending any of the district's money upon any building not belonging to the district. The matter of hearing upon the application for a temporary injunction was duly set and noticed for September 9, 1948, at 10 a. m. In the meantime, a director notified plaintiffs of the proceedings, and that school would not be opened on September 6, 1948, as planned.

Thereafter, on September 9, 1948, after hearing whereat evidence was adduced, and over objections by defendants, the district court granted a temporary injunction conditioned upon the giving of a $1,000 bond, which injunction enjoined defendants from leasing or carrying out the terms of any lease for school buildings or changing the school site until and unless approved by electors of the district. They were also enjoined in any event from maintaining a high school.

Thereafter, on September 24, 1948, the voters of the district unanimously voted against a proposal to lease a described hall for school purposes, whereupon defendant officers answered, denying generally any right to injunctive relief, alleging that the district for many years prior to 1947-1948, had lawfully maintained an eighth grade and a four-year high school and that in attempting to hire teachers and lease buildings for school purposes they were merely carrying out the duties im-

posed by statute upon officers of such a district. They prayed for dissolution of the temporary injunction and dismissal of the petition at plaintiffs' costs.

On November 24, 1948, a trial of the issues was had whereat evidence was adduced and the cause was submitted to the court. Briefs were subsequently filed by counsel for the parties and on April 19, 1949, a memorandum opinion was filed by the trial court and a decree was rendered, finding and adjudging the issues generally in favor of plaintiffs and against defendants, with costs taxed to defendant moderator and director. It concluded substantially that such officers had, without legal authority, attempted to lease buildings, change the schoolhouse site, spend school funds, and conduct a high school in the district, and that the temporary injunction theretofore granted should be made permanent in accord with the prayer of plaintiffs' petition. It then so decreed, permanently enjoining defendants from leasing or attempting to lease a school building for school purposes, changing or attempting to change a school site, and from making any expenditure of district funds without and until so authorized by vote of electors of the district, and enjoined defendants from maintaining a high school in any event.

Therefrom defendants timely appealed to this court whereat in the opinion, Griggs v. School District, *supra*, it was concluded that defendant district was and had been for many years beyond the limitations of section 79-308, R. S. 1943, an article 6 and not an article 3 school, that its officers were governed by the statutes and regulations with reference thereto, and that until the legal voters in the district proceeded by law to effect a change in its organization such powers so remained. Consequently it was concluded that the officers could conduct a grade and high school, employ teachers, enter into contracts necessary to performance of their duties authorized by law, with implied power in an emergency to lease buildings suitable for school purposes, that the

leasing of a building for use as a temporary school was not a change of the school site within the purview of the statute, and that such school board was authorized to draw and deliver warrants in payment of expenses necessary to conduct and maintain the school.

In the light thereof we concluded that the trial court erred in granting plaintiffs any of the relief sought. Thus we reversed the judgment and dismissed the cause. The mandate therein, appearing in the record now before us, dated February 17, 1950, so ordered, taxed costs to plaintiffs as appellees, and awarded execution therefor.

Defendant argued in the present appeals that, in the light of the provisions of then applicable statutes, the alleged contracts involved were invalid.

In that connection, section 79-1310, R. S. 1943, provided in part: "The Nebraska Third Grade Elementary School Certificate shall be valid in kindergarten to eighth grade inclusive for a period of three years in schools organized under sections 79-301 to 79-311." Such schools are generally designated as article 3 schools.

Section 79-1333, R. S. 1943, provided: "No person shall be employed to teach in any public, private, denominational or parochial school in this state who does not hold a valid Nebraska certificate legalizing him to teach the grade or subjects to which elected."

Section 79-1338, R. S. 1943, provided: "Each holder of a teacher's certificate shall, *before contracting to teach, register the same* in the office of the county superintendent of the county in which he is contracting to teach. The superintendent shall endorse upon the certificate that it has been registered and the date thereof. Such registration shall be without fee, and *no certificate to teach nor contract for a school shall be valid until the certificate is so registered.* The school board at the time of contracting with a teacher shall transmit to the county superintendent the name of the teacher to be employed, together with the position to which elected.

The county superintendent at the time of receiving notice shall certify to the school board the name of any teacher who has not met with the requirements of the law as herein provided, and *such contract and certificate shall be invalid* and the teacher *shall* be immediately dismissed by the board." (Italics supplied.)

Section 79-1339, R. S. 1943, provided: "The school board shall be personally liable for all public moneys paid to teachers who are not qualified under the provisions of sections 79-1309 to 79-1339. A teacher violating the provisions of said sections shall not recover any moneys for services while teaching *during the time that such contract and certificate are invalid.*" (Italics supplied.)

Plaintiffs' contention that validity of the contracts here involved was res judicata by reason of the opinion in Griggs v. School District, *supra,* has no merit. The applicable rule is that a judgment is not res judicata as to any fact at issue in subsequent actions where neither issues nor parties are the same. Plattsmouth Bridge Co. v. Turner, 128 Neb. 738, 260 N. W. 562; Gulizia v. Royal Indemnity Co., 139 Neb. 832, 299 N. W. 220.

It will be noted that plaintiffs Kuhl and Moffett not only did not register any certificate in the office of the county superintendent before contracting to teach, but also in fact plaintiff Moffett had no certificate whatever when the contract was executed, and neither of such plaintiffs ever held a certificate authorizing her to teach in an article 6 school such as defendant had been for almost a quarter of a century. See Griggs v. School District, *supra.* Whether or not the county superintendent and others thought that defendant was an article 3 school district is of no consequence. Therefore, under the express provisions of the foregoing statutes such plaintiffs were not qualified to enter into any contract with defendant to teach, nor was defendant through its board authorized to enter into any con-

tract with such plaintiffs for that purpose and, as provided by statute, their contracts were invalid.

Their situation is identical in principle with that of the plaintiff in Zevin v. School District, 144 Neb. 100, 12 N. W. 2d 634, wherein a recovery was denied upon the ground that the contract was void. In doing so, we quoted with approval from 24 R. C. L., § 73, p. 616, where it is said: " 'There are statutes in many jurisdictions providing that persons teaching in the public schools must be holders of teachers' certificates and the question has frequently arisen as to the effect of a contract made by a board with a person not so qualified. Such provisions may be neither waived nor dispensed with and it has been held broadly that the possession of the certificate is a necessary prerequisite to appointment or employment and that any contract made with a teacher not having such certificate is void so as not even to be susceptible of ratification, and that a teacher who lacks the required certificate or license cannot recover on his contract for services rendered thereunder, because the right of a public officer to the compensation of his office is incident to and dependent upon his right and title to the office.' " That rule would prevent plaintiffs Kuhl and Moffett from recovering anything upon their alleged contracts.

On the other hand, plaintiff Fluent did hold a Nebraska Provisional Administrative and Supervisory Certificate at the time the alleged contract was executed on August 13, 1948. It was not registered at that time but that was done on August 18, 1948, before the effective date of the injunctions and before school was supposed to open. However, he never did teach in defendant school, but upon being prevented from doing so by the injunctive orders, he obtained employment elsewhere at a lesser salary and here claims the difference. His case is factually distinguishable from that of plaintiffs Kuhl and Moffett here and the plaintiff in Zevin v. School District, *supra*, but whether or not his contract

was invalid for failure to register the same "before contracting to teach" we are not required to decide. As hereinafter observed, we may assume for purpose of argument only that it was valid and arrive at the same result.

In that connection, there is good reason why none of the plaintiffs could recover in any event. Each of the contracts provided that they could be terminated "by the operation of law" without "penalty." We conclude that they were so terminated by the injunctive orders heretofore discussed. With regard to that conclusion, in Restatement, Contracts, § 458, p. 852, entitled "Supervening Prohibition or Prevention by Law" it is said: "A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited * * * (b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States."

Illustration 3 at p. 854 following such section is identical in all material respects with the case at bar. To paraphrase it would serve no purpose. It is sufficient for us to say that in the absence of circumstances showing a contrary intention or contributing fault by defendant, the rule is controlling here.

As stated in 6 Corbin on Contracts, § 1346, p. 348, citing cases: "Performance of a contract is sometimes prevented by a judicial order or decree forbidding such performance or by a judicial seizure of subject matter or of the means necessary to performance. Some cases have held that this kind of prevention is not a good excuse for non-performance. These holdings can be justified if the judicial action was brought about by reason of the defendant's default in performance of some other legal duty, or if the defendant could have prevented such judicial action by diligent effort. The de-

fendant owed a duty to the plaintiff to perform his contract; and this includes the duty of taking all steps that are necessary to such performance, even including the prevention of interference by third parties so far as is possible by a reasonable degree of effort.

"Prevention of performance by judicial order or decree, at the instigation of third parties, may properly be held to be a valid defense in an action for breach of contract, if it was not caused by the defendant's own negligence or breach of duty to others and if no means of avoiding such interference with performance are reasonably available." The case at bar comes squarely within such statement. See, also, 6 Williston on Contracts (Rev. Ed.), § 1939, p. 5432; 13 C. J., Contracts, § 720, p. 646; 17 C. J. S., Contracts, § 467, p. 964.

As simply stated in Bishop on Contracts (2d Ed.), § 607, p. 256: "Judicial process,—interrupting the doing of the thing, and rendering it impossible, will excuse performance."

In 12 Am. Jur., Contracts, § 379, p. 956, note 1, it is said: "The doctrine that where performance of a contract is prevented by the action of a court of competent jurisdiction nonperformance is excused has been expressly approved as falling within the rule that where a party is prevented from performance of a contract by an event of such a character that it could not reasonably be supposed to have been within the contemplation of the contracting parties when the contract was made, nonperformance is excused. Annotation: L. R. A. 1916F, 75."

In School District v. Howard, 5 Neb. Unoff. 340, 98 N. W. 666, the school was closed by order of the board of health. A teacher sought in that action to recover wages allegedly due under his contract during such period. Defense by the district was that it was prevented from carrying out the contract because it was made impossible by law. In that opinion this court reversed the judgment for plaintiff, saying: "But the

action of the district in closing the school was not voluntary. It was the act of the law which the district and all others were compelled to obey." See, also, 56 C. J., Schools and School Districts, § 373, p. 420, citing the aforesaid Nebraska case and Gregg School Township v. Hinshaw, 76 Ind. App. 503, 132 N. E. 586, 17 A. L. R. 1222, a case almost identical therewith.

In Burkhardt v. Georgia School Township, 9 S. D. 315, 69 N. W. 16, it was held: "An injunction restraining a person from performing a contract with a school board for the removal of a school house will excuse such person from performing his contract, in the absence of a showing that the injunction was dissolved within such time as made it necessary for him to resume work."

In Olyphant Borough School District v. American Surety Co., 322 Pa. 22, 184 A. 758, it is said: "It is a fundamental principle that where the performance of a contract is prevented, without fault on the part of the promisor, by a proper judicial order, the obligation to perform is discharged: Restatement, Contracts, section 458; see Monaca Boro. v. M. & A. St. Ry. Co., 247 Pa. 242; 3 Williston, Contracts, section 1939."

It has long been the rule in this jurisdiction that: "A party is not punishable for contempt of court for disregarding a void order of injunction; but, when an injunction is legally granted in a case where the court has jurisdiction of the subject matter and of the parties, it must be respected until it is set aside by the court allowing it, or is reversed in the appellate court by some appropriate mode of direct review." Miles v. State, 74 Neb. 684, 105 N. W. 301. See, also, 28 Am. Jur., Injunctions, § 330, p. 503. Concededly, the injunctive orders here involved were not void and defendant district and its officers were required to obey them until the granting thereof was reversed by this court upon appeal.

In the case at bar the injunctive orders prevented defendant district from opening or holding school dur-

ing all and more of the period involved in the contracts. Thus the thing contracted to be done was thereby made impossible of performance by law. There is no obligation to do impossible things.

We have been cited no authority by plaintiffs and have found none holding, under circumstances comparable with those at bar, that defendant was required to perform the contracts involved.

For the reasons heretofore stated we conclude that the respective judgments should be and hereby are each reversed and the actions are each dismissed. Costs in each case are taxed to the respective plaintiffs therein.

REVERSED AND DISMISSED.

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JULIUS SCHMIDT, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.
51 N. W. 2d 759

Filed February 15, 1952. No. 33102.

**Criminal Law: Appeal and Error.** This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

ERROR to the district court for Saline County: STANLEY BARTOS, JUDGE. *Affirmed.*

*John E. Mekota,* for plaintiff in error.

*Clarence S. Beck,* Attorney General, and *Homer L. Kyle,* for defendant in error.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Julius Schmidt brings this error proceeding from his conviction in the district court for Saline County of the charge of unlawfully operating a motor vehicle

upon the highways in Saline County while under the influence of alcoholic liquor.

In this opinion we will refer to the petitioner in error as the defendant.

Defendant's primary contention is that the evidence adduced is not sufficient to sustain the conviction.

We held in Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873: "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt."

The State offered the evidence of the arresting officer, State Safety Patrolman Winston L. Flowers. He testified that during the evening of October 2, 1950, at about 9:30 p. m., he observed defendant's car going north on State Highway No. 82 a short distance north of Wilber, Nebraska; that because of the manner in which the car was being driven he followed it for about two miles; that while he followed it the car swerved back and forth; that he stopped the car and defendant was driving it; that he smelled a heavy odor of alcohol about defendant; that he found two pint bottles of liquor in defendant's car with the seals broken, one being whiskey and the other peppermint schnapps; that as defendant walked from his car to the patrol car he staggered and swayed; that he brought defendant to the jail in Wilber; that when defendant got out of the patrol car at the jail he staggered and almost fell; that he gave defendant some tests while at the jail and testified to defendant's reaction thereto; that defendant was quarrelsome; and that based on what he observed he was of the opinion defendant was under the influence of intoxicating liquor.

The State also offered the evidence of Richard Shestak, a deputy sheriff of Saline County, who observed defendant that night at the jail in Wilber when he was brought there by patrolman Flowers. Shestak testified he saw defendant that night and observed his unsteady condi-

tion, his quarrelsome and belligerent attitude, and from what he observed thought defendant was under the influence of liquor.

We think the evidence presented a case for the jury and that the jury's verdict of guilty is sufficiently supported by the evidence adduced.

The defendant further contends that the court erred in admitting, over objection, certain testimony of Charles Mundil, a witness for the State. Mundil testified that on the evening in question while driving a truck south on State Highway No. 82 just north of Wilber he met a car coming toward him that "* * * was too close for comfort and I pulled over." The basis for the objection is insufficient foundation based on the fact that the car was not identified as belonging to defendant.

We think this contention is without merit. The foundation as to the car Mundil referred to being defendant's is fully established by the State's witnesses patrolman Flowers and Richard R. Kacl. Kacl was riding in the cab of the truck with Mundil. Kacl testified it was defendant's car as he had observed the license number. Flowers, who was following defendant's car, also testified to the incident of defendant's car crowding a truck over onto the shoulder of the highway.

But assuming that no sufficient foundation had been laid from which the jury could have found that the car Mundil referred to was defendant's, still we do not think the nature of the evidence is of such a character, in view of the entire record, that it could be said it would have prejudiced defendant's rights.

Finding defendant's contentions to be without merit, and it appearing from the record that defendant had a fair trial, we affirm the verdict and sentence of the trial court.

AFFIRMED.

ANDREW NELSON ET AL., APPELLANTS, V. HELEN GLIDEWELL ET AL., APPELLEES.
51 N. W. 2d 892

Filed February 29, 1952. No. 33076.

1. **Specific Performance: Frauds, Statute of.** Where a party seeks specific performance of an oral contract for the conveyance of land of a deceased person, the burden is on such person to prove an oral contract, the terms of which are clear, satisfactory, and unequivocal and that the acts of part performance in relationship to the subject matter in and of themselves are such as are referable solely to the contract sought to be enforced and cannot be accounted for on any other reasonable hypothesis.
2. **Wills: Attorney and Client.** An attorney may testify to factual matters relating to the execution of a will but anything in the nature of a communication is privileged and inadmissible unless waived.
3. **Witnesses: Evidence.** When two or more persons employ the same attorney in relation to the same business their communications are not privileged between themselves, even though their interests may be diverse, where the disclosures are made in the presence of all parties concerned, or are intended for the information of all parties.

APPEAL from the district court for Cheyenne County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

*Torgeson, Halcomb & O'Brien,* for appellants.

*Beatty, Clarke, Murphy & Morgan,* and *Martin & Davis,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action in equity by Andrew Nelson and Anna Nelson, husband and wife, plaintiffs and appellants, against Helen Glidewell, widow of George H. Glidewell; O. A. Olson, administrator of the estate of George H. Glidewell; and the unknown heirs of the said George H. Glidewell, defendants and appellees.

The action is for specific performance of an alleged oral agreement by which George H. Glidewell, in his

lifetime, and Helen Glidewell, whose name was formerly Helen Kennedy, agreed to execute reciprocal and mutual wills each devising to the other his or her property and on death of the surviver to the plaintiffs herein, which wills were to be drawn after the marriage of George H. Glidewell and Helen Kennedy so as to permit bequests totaling $500 to take precedence over the devise to the Nelsons contemplated by the agreement. The alleged agreement was entered into on or about May 8, 1940. The marriage took place thereafter on May 29, 1940.

Among other defenses to the action the defendants denied that any such agreement as was alleged or any enforceable agreement was entered into between the parties.

The cause was tried and at the close of the evidence of plaintiffs the trial court among other findings found that the plaintiffs had failed to prove the existence of a valid and enforceable contract and by decree dismissed plaintiffs' action with prejudice. Motion for new trial was duly filed and overruled. From the decree and the order overruling the motion for new trial the plaintiffs have appealed. There are numerous assignments of error.

The substance of one group of the assigned grounds for reversal is that the court erred in finding and decreeing that plaintiffs had failed to prove the existence of a valid and enforceable contract.

In a case such as this where a party seeks specific performance of an oral contract for the conveyance of land of a deceased person, the burden is on such person to prove an oral contract, the terms of which are clear, satisfactory, and unequivocal and that the acts of part performance in relationship to the subject matter in and of themselves are such as are referable solely to the contract sought to be enforced and cannot be accounted for on another reasonable hypothesis. Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66; Lintz v. Apking, 145 Neb. 714, 18 N. W. 2d 55; Lunkwitz v. Guffy, 150 Neb.

247, 34 N. W. 2d 256; Casper v. Frey, 152 Neb. 441, 41 N. W. 2d 363; Busteed v. Sheffield, 153 Neb. 253, 44 N. W. 2d 471.

The only evidence of the contract alleged or of any other contract between these parties is the following: "Q Will you please tell the Court what Mrs. Glidewell said to any of you—to you or to Mr. Kepler or to Mr. Glidewell or to Mr. Nelson in this conversation in May, 1940 when Mr. Kepler was out to your house in the presence of these other people and during the afternoon? A Well, Mr. Kepler come out at 2 o'clock in the afternoon, and she said, 'we want Mr. Kepler to come out because George and I have decided to make up some papers', and I said, 'Oh, you have?', and she said 'yes', and so Mr. Kepler came out and we was not quite through eating, and he told us to finish our meals, and after we finished our dinner Mr. Kepler and Mr. and Mrs. Glidewell went into our front room and shut the door. Q Who was that, the Glidewells? A Yes, Mr. and Mrs. Glidewell, and after they had a conversation in the front room they came out in the dining room and sat around the table, and Mrs. Glidewell spoke up and she said, 'Mrs. Nelson, Mr. Kepler is going to make out some papers, and we was wondering if you two folks would be willing to take care of us after a while'—she said, 'when we need help', and I asked her if she would just let me think a little bit and decide with Mr. Nelson, and she said 'yes', and then we decided we would, and then she said 'we will have Mr. Kepler make out a will for you', and so Mr. Kepler spoke up and he said 'I am going to town and make these papers and I will be out to your house with some witnesses, and I will come out there and have them signed by you', and Mr. Kepler asked if we was willing and satisfied to take care of them and I answered, 'yes'. Q Did Mrs. Glidewell speak to Mr. Glidewell while you were there? A She said to Mr. Glidewell, 'Is that all right George' and he said 'yes, it is okay with me'. * * * Q Now, Mrs.

Nelson, when George was talking there, was he talking to anyone other than you, or to whom did he talk to? A To all of us in the room; Mr. Kepler, Mr. Nelson, me and Mrs. Glidewell; we was all around the table. Q What did Mrs. Glidewell say, if anything, about the relatives? A Well, she said 'George and I have decided there is not any of our relatives that is going to inherit after us, because we got a right to give our property and what we got to anybody that we want to'. Q What did George say back to Mrs. Glidewell? A He said the same thing."

The only evidence offered in addition to this was testimony of R. P. Kepler, an attorney. Whether or not this offered testimony had probative value in support of the alleged contract we are not required to decide. It was clearly inadmissible.

The testimony sought to be elicited was clearly communications and information received by Kepler in the role of attorney for the Glidewells and therefore inadmissible. §§ 25-1201 and 25-1206, R. R. S. 1943; In re Estate of Coons, 154 Neb. 690, 48 N. W. 2d 778.

In re Estate of Coons, *supra,* contains the latest expression of this court on this subject. In the opinion it is pointed out that an attorney may testify to factual matters relating to execution of a will but that anything in the nature of a communication is privileged and is inadmissible unless waived.

The appellants assert that Kepler was attorney for both parties in relation to the same business and contend for the rule that when two or more persons employ the same attorney in relation to the same business their communications are not privileged between themselves, even though their interests may be diverse, where the disclosures are made in the presence of all parties concerned, or are intended for the information of all parties. Adler & Sons Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877; Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637.

This rule can have no application in this case since under the facts it cannot be said that Kepler was ever attorney for the plaintiffs and the Glidewells. Kepler was called, it is true, by the plaintiffs but at the instance and request of the Glidewells to perform service alone for the Glidewells.

The admissible evidence in the record we conclude is not sufficient within the meaning of the stated legal principles as proof of the contract alleged. It falls short of clear, satisfactory, and unequivocal evidence of the terms of the contract alleged.

The finding of the district court and the decree dismissing the action with prejudice was in all respects proper.

This conclusion renders unnecessary consideration of the other assignments of error.

The decree of the district court is affirmed.

AFFIRMED.

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ROBERT R. JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM PARENTI, DECEASED, APPELLEE, V. CECIL A. JASTRAM, APPELLANT.
52 N. W. 2d 245

Filed February 29, 1952. No. 33082.

1. **Negligence.** Gross negligence within the meaning of section 39-740, R. S. 1943, means great or excessive negligence. It indicates the absence of slight care in the performance of a duty.
2. ———. Whether or not one is guilty of gross negligence in a given case depends upon the facts and circumstances of the particular case.
3. ———. Ordinarily the question of gross negligence is one of fact for a jury, but if the evidence respecting it is not in conflict or is so conclusive that ordinary minds may not draw different conclusions therefrom the question is one of law for the court.

APPEAL from the district court for Cedar County: SIDNEY T. FRUM, JUDGE. *Reversed and remanded with directions.*

*George B. Boland* and *Clarence E. Haley,* for appellant.

*H. D. Addison* and *Philip H. Robinson,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Robert R. Johnson, administrator of the estate of William Parenti, deceased, plaintiff, against Cecil A. Jastram, defendant, for damages for the claimed wrongful death of the said William Parenti.

The action was tried to a jury. At the close of plaintiff's evidence the defendant moved in the alternative for a directed verdict or for dismissal of plaintiff's cause of action on the ground that the evidence did not sustain a right of recovery. This motion was overruled. Again at the close of all of the evidence the defendant made a like motion for the same purpose. This motion was likewise overruled, whereupon the issues were submitted to a jury.

The jury returned a verdict in favor of plaintiff for $7,500. Thereafter timely motions were filed for judgment notwithstanding the verdict and for a new trial. These motions were overruled. From the judgment and the orders overruling the motions for judgment notwithstanding the verdict and for a new trial the defendant has appealed.

There is no materially substantial dispute in the evidence in the case or the legal theory on which it comes to this court.

The theory on which the petition is drawn is that on June 22, 1950, plaintiff's decedent was a guest passenger, within the meaning of section 39-740, R. S. 1943, in an automobile owned and operated by the defendant and that while he was such guest the defendant was guilty of gross negligence in the operation of the said automobile also within the meaning of section 39-740, R. S. 1943, which resulted in the death of plaintiff's decedent.

In the district court the defendant defended the action on the ground that the evidence was insufficient upon which to base a verdict that he was guilty of gross negligence and further that within the meaning of law plaintiff's decedent was not a guest but was engaged upon a joint enterprise with defendant and hence there could be no liability. In his brief he has not presented this latter theory. The case therefore will be determined upon the question of whether or not the evidence was sufficient to sustain the effectual finding of the verdict that the defendant was guilty of gross negligence.

In determining whether or not the evidence was sufficient to present a question of gross negligence to a jury under the statute certain principles are to be borne in mind. These principles are tersely stated in Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591. The statements are in conformity with numerous pronouncements of this court contained in cases cited in the annotations to section 39-740, R. S. 1943. They are:

Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.

What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence.

Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine.

In an action for gross negligence under the automobile guest statute where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach

the level of negligence in a very high degree under the circumstances.

The substantial facts to which these principles have application are that plaintiff's decedent and the defendant were, on June 22, 1950, and for some time prior thereto had been, insurance agents or salesmen employed by the same insurance company. As such for a part of the time they combined their efforts and worked together in the solicitation of prospects, the procurement of insurance contracts, and the collection of premiums. The income from this business was equally divided between the two. Each of the two had an automobile both of which were used from time to time. When the automobile of one was used that one would furnish gas and oil and the other would pay for meals and other incidentals while they were working. Plaintiff's decedent had a Packard and defendant a Ford.

On June 22, 1950, near 3 p. m. in pursuance of the described custom the two left Hartington, Nebraska, in the Ford with the defendant driving, to call on a customer. Plaintiff's decedent was sitting to the right of defendant in the front seat. They proceeded southward out of Hartington on a black-top highway which highway was in excellent condition. The speed at the time of the incidents complained of was estimated at from 50 to 55 miles an hour. The day was clear, warm, and windy. About two miles south of Hartington at about 3:10 p. m. the right front of the automobile came into collision with the north end of the west abutment of a bridge. In consequence of this the automobile was thrown about and plaintiff's decedent was killed.

The evidence as to the cause was that plaintiff's decedent remarked to defendant that a wasp or yellow jacket had come into the automobile and stung him, whereupon he slapped it or at it and that it was on the defendant. Thereupon the defendant removed his right hand from the steering wheel and his eyes from the road and slapped at the insect. These happenings it

is clearly inferable were instantaneous. In that instant the right wheels of the automobile left the paving to the right thereof about 50 feet north of the bridge and so continued until the collision took place. The defendant looked up and saw the bridge before the collision but too late either to turn aside or stop before striking the abutment.

This we think is a fair résumé of the evidence upon which the plaintiff bases his claim that the defendant was guilty of gross negligence. There are four specifications of gross negligence in the petition upon which the case was submitted to the jury. One is excessive speed. There is no evidence to sustain it. The speed was well within the maximum provided by statute and there is no evidence of circumstances up to the time defendant's attention was distracted from his driving indicating any unsafety in the rate at which he was driving.

The other three are that he failed to steer and operate the automobile so as to have it under proper control; that he failed to keep a proper lookout; and that he failed to keep his automobile on the hard surface of the highway.

It is true that there was a loss of control, a failure of proper lookout, and a leaving of the hard surface of the highway, and that if there had been no failure in these respects there would have been no accident. These failures however are not sufficient upon which to base a conclusion that there was evidence upon which to submit the issue of gross negligence to a jury.

These failures were set in motion by the distracting remarks and actions of plaintiff's decedent.

This court has repeatedly held that momentary inattention such as is described in the evidence in this case does not amount to gross negligence. This is true even where the inattention is purely voluntary and is in nowise induced or contributed to by a distracting influence.

The case of Black v. Neill, 134 Neb. 764, 279 N. W. 471,

is one where the driver of an automobile turned his head to direct attention to a tree which had been blown down onto a porch after which to avoid striking a preceding automobile he suddenly applied his brakes which caused the plaintiff guest to be thrown into the windshield. This court said as a matter of law that this was not evidence of gross negligence.

Lemon v. Hoffmark, 132 Neb. 421, 272 N. W. 214, is a case where the driver of an automobile was handed something to eat, whereupon she turned her head in consequence of which an accident occurred. This court held as a matter of law that this was not gross negligence.

Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381, is one where the driver of an automobile took her attention from her driving and was looking over some cookies which had been placed on the front seat. This court said this was not evidence of gross negligence.

Therefore unless this court is prepared to depart from its previous holdings and decisions in cases bearing comparable analogies to the facts in this case it becomes necessary to say as a matter of law that the evidence in this case was not sufficient upon which to submit the question of gross negligence within the meaning of the guest statute to a jury. We are not prepared to so depart.

It follows that the court erred in overruling the motions in the alternative for a directed verdict or for a dismissal of plaintiff's petition and the motion for judgment notwithstanding the verdict.

The judgment of the district court is reversed and the cause remanded with directions to render judgment in favor of the defendant and against the plaintiff notwithstanding the verdict of the jury in favor of the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

PAUL M. WILSON, APPELLANT, V. RAY O. WIGGINS, APPELLEE.
52 N. W. 2d 248

Filed February 29, 1952. No. 33088.

1. **Automobiles: Negligence.** A pedestrian who walks across a street between intersections is required to exercise a greater degree of care than one who walks across a street at a crosswalk where protection is afforded by giving the pedestrian the right-of-way.
2. ———: ———. One who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions from which danger should reasonably be anticipated.
3. ———: ———. It is elementary that one who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law.
4. ———: ———. Unless some reasonable excuse is shown which is consistent with the facts established, one who is obligated to keep a lookout for vehicles or persons favored over him is required to see that which is in plain sight. Where he fails to do so, his negligence is sufficient to defeat a recovery.
5. ———: ———. The above rules apply under a statute which provides that every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk, or intersection shall yield the right-of-way to vehicles upon the highway.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Affirmed.*

*V. H. Halligan* and *Baskins & Baskins,* for appellant.

*W. A. Stewart,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action for damages for injuries sustained by plaintiff as a result of being struck by a truck driven by the defendant. Issues were made and trial was had, resulting in a verdict for defendant. Plaintiff appeals, assigning error in the submission of the issue of con-

tributory negligence to the jury. We affirm the judgment of the trial court.

The accident occurred in Gothenburg between intersections on a main traveled street, it being U. S. Highway No. 30, going east and west. The accident happened about 6 p. m., on July 25, 1947. The weather was clear, the pavement was dry, and there was no limitation of visibility. The street at that point is paved and 40 feet in width with two lanes in each direction. Of the two west-bound lanes, the north one is used for parallel parking. Of the two east-bound lanes, the south one is used for what some of the witnesses described as slow traffic. On the south there was a "lip" curb permitting cars to drive over it into a parking area to the south of the pavement.

Plaintiff and two companions had crossed the street from the north and had reached the south edge of the pavement when defendant's truck coming from the west hit plaintiff and caused his personal injuries.

There is ample evidence in the record from which the jury could find the following factual situation.

Defendant's truck was parked east of the intersection off the pavement on the south side of the street. One of plaintiff's companions was the owner of a car also parked off the pavement on the south side and east of the defendant's truck a short distance.

Plaintiff, his two companions, and the defendant had been in a beer parlor on the north side of the street approximately straight across from the parked cars. Defendant, leaving first, went across the street, got in his truck, backed it into the south of the two east-bound lanes, and drove it straight east in the south lane at a speed of one to ten miles an hour. Plaintiff and his two companions also left the beer parlor and started across the street to enter the car. They waited near the north curb for a west-bound car to pass, and then, abreast, plaintiff in the center, the three walked straight across the street to the south. Plaintiff looked

to the west when at the center of the street, or 18 to 20 feet from the south side, and at the north of the two east-bound lanes. He did not look again to the west after he passed the center of the pavement. He did not see defendant's truck until the accident happened. Plaintiff was struck by the right front wheel of defendant's truck while plaintiff was still on the pavement. Defendant's truck was on the pavement. One of plaintiff's companions looked to the west when at the center of the pavement and saw nothing. He looked again to the west when ten feet from the south line of the pavement or at the north line of the south lane for east-bound traffic, and he then saw defendant's truck moving east 35 to 40 feet away. Plaintiff was in the center of the highway when defendant backed out. The plaintiff and his two companions continued on south across the lane of traffic in which defendant was driving and walked in front of and into the path of defendant's truck, with the result above indicated.

The accident concededly did not occur at a regular crosswalk or pedestrian crossing.

Section 39-751, R. S. 1943, provides in part: "The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary line of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices. Every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk or intersection shall yield the right of way to vehicles upon the highway."

A pedestrian who walks across a street between intersections is required to exercise a greater degree of care than one who walks across a street at a crosswalk where protection is afforded by giving the pedestrian the right-

of-way. Doan v. Hoppe, 133 Neb. 767, 277 N. W. 64.

One who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions from which danger should reasonably be anticipated. "It is elementary that one who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law." "* * * unless some reasonable excuse is shown which is consistent with the facts established, one who is obligated to keep a lookout for vehicles or persons favored over him is required to see that which is in plain sight. Where he fails to do so, his negligence is sufficient to defeat a recovery." Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613. See, also, Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436.

Plaintiff contends that it is not a violation of law under the above statute to cross a street at any point other than a crosswalk. In a similar case with reference to the violation of an ordinance, we held: "While it is true in the case before us that the applicable city ordinance did not make it a violation of law to cross a street at any point other than a crosswalk, the duty of the pedestrian is the same in any event. * * * Even though the ordinance provides only that a pedestrian crossing the street at any other point other than within a marked or unmarked crosswalk shall yield the right-of-way to vehicles upon the street, the rule announced with reference to the duty of one so doing is as pertinent in the one case as in the other." Kristufek v. Rapp, 154 Neb. 343, 47 N. W. 2d 923. The rules above stated are applicable here under the statute above quoted.

We are here required under the assignment to determine only whether or not there was evidence to take the issue of contributory negligence to the jury. Clearly there was such evidence. The assignment is not sustained.

Plaintiff further contends that it was the duty of the trial court to instruct that he was under no duty to main-

tain a lookout for vehicles approaching from the rear. Plaintiff relies on Brenning v. Remington, 136 Neb. 883, 287 N. W. 776; Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114; Floyd v. Edwards, 150 Neb. 41, 33 N. W. 2d 555; and Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549.

There is evidence in the record that the line of travel of the plaintiff and his companions across the street was to the southeast. The testimony of the plaintiff and one of his companions is that they went "straight" across the street. The testimony of the witnesses as to the location of the beer parlor and the parked car that plaintiff was going to, the distances given from the intersection at the west to the car, to the point of the accident, and to the beer parlor all indicate that the deviation from a rectangular line to defendant's course of travel at best was slight.

We need not discuss the cases relied upon by the defendant. Clearly they are not factually in point. We need but point out that Trumbley v. Moore, *supra,* involved walking in a "diagonal direction," and in Kristufek v. Rapp, *supra,* plaintiff was "angling back to his car in a southeasterly direction." We find nothing in the evidence that required the court to give an instruction such as plaintiff contends should have been given.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY TO DISCONTINUE AGENCY AT THE STATION OF ELLSWORTH, NEBRASKA, AND TO SUBSTITUTE A CUSTODIAN THEREFOR. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, APPELLANT, V. ORDER OF RAILROAD TELEGRAPHERS, APPELLEE.
52 N. W. 2d 238

Filed February 29, 1952. No. 33098.

1. **Railroads: Public Service Commissions.** A final order of the railway commission granting or denying a railroad company permission to discontinue an agency at a particular station is unreasonable and arbitrary unless its findings and conclusions conform to the law and are supported by the evidence.
2. ———: ———. It is arbitrary and unreasonable to require the maintenance of a full-time agency the year around at a station where the principal business is seasonal carload shipments, and the cost of such service is out of proportion to the revenue derived from that portion of the public benefited thereby, especially where full-time agency service is to be provided during such shipping season and a substitute custodial service will afford the same essential although less convenient service during the remainder of the year.

APPEAL from the Nebraska State Railway Commission. *Reversed and remanded with directions.*

*J. W. Weingarten* and *Walter P. Loomis*, for appellant.

*Harry E. Gantz, Donald E. Williams, C. O. Griffith*, and *William H. Hein*, for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

The Chicago, Burlington & Quincy Railroad Company, hereinafter called the carrier, filed an application with the Nebraska State Railway Commission, hereinafter called the commission, requesting authority to discontinue station agency and substitute custodial service therefor except during the cattle shipping months of September and October, at Ellsworth, Nebraska. No

written objections were filed, but interested persons did appear with counsel at the hearing and orally protested. The application was denied, and upon the overruling of its motion for rehearing the carrier appealed to this court, assigning substantially that the order of denial was arbitrary, unreasonable, and contrary to law. We sustain the assignment.

Applicable rules of law are well established in this jurisdiction. They will not be repeated in this opinion. It is sufficient for us to say that they will be found in Thomson v. Nebraska State Railway Commission, 143 Neb. 52, 8 N. W. 2d 552; In re Application of Union P. R. R. Co., 149 Neb. 575, 31 N. W. 2d 552; and In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 367, 41 N. W. 2d 165.

Such rules have been predicated by this court upon the proposition that although the state has broad powers of regulation, it does not enjoy the freedom of an owner of the carrier, and that unless public necessity requires it, the discretion of the carrier in establishing and maintaining its stations should not be interfered with by the commission.

In the final analysis, when an application is made for additional service or to discontinue an existing service, the question to be determined is the public need or lack of need therefor. In deciding such question the cost of providing the service and revenue derived therefrom are important elements although not controlling. It is contemplated, of course, that the carrier shall provide adequate and comprehensive service to the public in the territory which it serves. In that connection such duties and responsibilities of a carrier are taken into consideration by rate-making bodies in the fixing of rates and charges which limit the revenue, dependent upon public use of the particular services the extent of which use measures the public need.

In the case at bar, a large part of the record, briefs of counsel, and arguments as well have been devoted to

the question of whether or not the carrier's theory of allocation of revenue and cost of operation at the station involved was correct. We do not consider that question of prime importance except insofar as sums involved may measure the public need by indicating the extent of use or lack of use of the services there made available by the carrier. In other words, the carrier is not required to maintain standby station agency service not comprehensively used by the public, or to be used only when other established carriers fail to meet the need.

The pertinent facts are not disputed. Ellsworth is an unincorporated village with a population of about 10 people. Its business district is composed of one general store and carrier's depot, with adjacent stockyards, side track, and industry track. The village is in the Alliance division, on the carrier's Kansas City-Billings line. It is located in the sandhills cattle country, 7.51 miles east of Lakeside and 19 miles west of Ashby, both of which are maintained as open-agency stations. The aforesaid mileage is practically the same by rail as by black-top highway No. 2 which parallels the railroad from Ravenna to Alliance, and goes through both Ellsworth and Lakeside. The people of Ellsworth have access over such public highway by truck, passenger, and other motor vehicles to the state's entire highway system.

No grain is shipped from Ellsworth. The only carloads forwarded therefrom are cattle, most of which are shipped in September and October of each year. A few carloads of feed, coal, and miscellaneous freight and less than carload lot shipments are received during the year, and a considerable portion of that is received freight prepaid. Truck lines also serve the community. For the last three years approximately 90 percent of the total revenue received at the station was from carload shipments. All of the freight shipments in 1950 averaged 17 a month. In 1949 they averaged 21 a month.

In 1948 they averaged 23 a month. There was a small amount of passenger, express, and Western Union business in addition. In that connection, in 1948 and 1950 there were 4 months of each year and in 1949 there were 5 months when no passengers whatever traveled from Ellsworth. It was clearly established that outside of September and October, months during which cattle were generally shipped, the agent had very little work to do, and that the average of all of it would take less than one hour's work during a day. The fact is that there was comparatively little business done at the station during the other 10 months of the year and the cost of maintaining the agency substantially exceeded the revenue for the whole year.

The train service consists of a west-bound passenger train No. 41, due in Ellsworth at 4:09 a. m., at which time there is no one on duty at the station. East-bound passenger train No. 44 is due at 11:42 a. m. Two other passenger trains, one in each direction, Nos. 42 and 43, do not stop at Ellsworth. There is also a west-bound afternoon local freight train on Tuesdays, Thursdays, and Saturdays, with no regular time schedule.

No change in such train service would result from the proposal contained in the application here involved. A centralized traffic control system with which trains are operated by signal devices and without train orders has been installed through Ellsworth, so that no train orders are used or handled by the agent and there is no need for a telegrapher to operate trains.

Nevertheless, until the present time the carrier has maintained an agent at Ellsworth, who is also a telegrapher working five days a week. In addition there is a custodian, the general store owner's son, who works Saturdays, Sundays, and holidays from 11 a. m. to 1 p. m.

The carrier proposed in the application to continue that same service during September and October, but during the rest of the year it was proposed to have a

custodian only who could live in the depot if desired. He will be on duty from 10 a. m. to 12 noon, and from 4 p. m. to 5 p. m. five days a week, and also from 10 a. m. to 12 noon on Saturdays, Sundays, and holidays. He will keep the depot clean, warm, and open from 10 a. m. to 5 p. m. Further, he will receive, care for, and deliver shipments to consignees. Lakeside will be the accounting station but shipments may be billed from Ashby. Of necessity Ellsworth will be a prepaid station except where the shipper has established credit with the carrier, which the merchant at Ellsworth has already done. The custodian will also receive and forward car orders to the accounting station, give instructions for shipping and moving cars or freight, and secure information for patrons about services and trains. He will also handle the express business. Passengers will pay their fares to the conductor without any surcharge and baggage will be checked on the train.

There will be a telephone in the depot waiting room, available to any person who can thereby call the agent at Lakeside or Ashby, send telegrams, give shipping instructions, and obtain any carrier information desired without telephone toll charges. Long distance telephone service is also available at the general store. For cattle shipments the storekeeper at Ellsworth is and has been the health and brand inspector.

The fact is that the carrier proposes to establish a substitute service for 10 months of the year which will afford the same essential service as theretofore, but of course it will be less convenient in some respects. While public convenience is an element to be considered, it is not controlling in the absence of a showing of public necessity, as in the case at bar.

We therefore conclude that the order of the commission denying the application of the carrier was arbitrary, unreasonable, and contrary to law.

Therefore, such order should be and the same hereby

is reversed and the cause is remanded with directions to grant such authority.

REVERSED AND REMANDED WITH DIRECTIONS.

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IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY TO DISCONTINUE AGENCY AT THE STATION OF BINGHAM, NEBRASKA, AND TO SUBSTITUTE A CUSTODIAN THEREFOR. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, APPELLANT, V. VILLAGE OF BINGHAM ET AL., APPELLEES.

52 N. W. 2d 241

Filed February 29, 1952. No. 33097.

**Railroads: Public Service Commissions.** The syllabus in In re Application of Chicago, Burlington & Quincy Railroad Company, *ante* p. 387, 52 N. W. 2d 238, is by reference adopted as the syllabus herein.

APPEAL from the Nebraska State Railway Commission. *Reversed and remanded with directions.*

*J. W. Weingarten* and *Walter P. Loomis,* for appellant.

*Harry E. Gantz, Donald E. Williams, C. O. Griffith,* and *William H. Hein,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an appeal by the Chicago, Burlington & Quincy Railroad Company from an order of the Nebraska State Railway Commission denying it the right to discontinue an agency at the station at Bingham, Nebraska, and to substitute instead a custodian and custodial service except during the months of September and October of each year during which two months agency service would be supplied.

No formal objection was filed to the application but a considerable number of citizens living in and in the vicinity of the village of Bingham appeared at the hearing and by the giving of evidence made objection thereto.

By appropriate procedure the order of the commission has been brought to this court for review. The railroad company is appellant, and on the records of this court and in the briefs the village of Bingham is designated as appellee.

The basis of the application is that convenience and necessity do not require the maintenance of agency service except during the months of September and October. The fundamental basis of the appeal is that the findings and adjudication by the commission contrary to the claims of the railroad company in its application for substitution of service are unreasonable, unjust, arbitrary, and clearly wrong.

Bingham is an unincorporated village on the line of the appellant extending from Kansas City, Missouri, to Alliance, Nebraska, and beyond. Its population is about 100. It is about 8½ miles from Ashby, Nebraska, to the east and about 18 miles from Lakeside, Nebraska, to the west. At these two points open stations and agencies are maintained. Nebraska State Highway No. 2, a "blacktop" surfaced highway parallels the railroad from Ravenna, Nebraska, to Alliance, Nebraska. The business establishments in Bingham are two stores; a gasoline and oil station, a soft drink, candy, and tobacco store, which are combined; and a dealer in auto parts.

The appellant bases its test of the propriety of the order of the commission on the history of the business transacted at this station in the years 1948, 1949, and 1950. In 1948 traffic consisted of 118 carloads for the year. This consisted of 104 carloads of cattle forwarded, 4 received, and 10 cars of other freight received. There were 152 less than carload lot shipments commonly referred to as L.C.L. shipments. In 1949 traffic consisted

of 117 carloads for the year. This consisted of 87 carloads of cattle forwarded, 1 received, 2 cars of seed forwarded, and 27 carloads of other freight received. There were 153 L.C.L. shipments. In 1950 traffic consisted of 72 carloads of cattle forwarded, 4 received, and 12 carloads of other freight received. There were 80 L.C.L. shipments.

Most of the forwarded shipments of cattle were made in September and October of each year. Probably a fair example is what happened in 1950. Of the 72 carloads of cattle which were forwarded in that year 65 moved in September and October.

These and the other facts disclosed by the record are so nearly like those in In re Application of Chicago, Burlington & Quincy Railroad Company, *ante* p. 387, 52 N. W. 2d 238, a case which like this was an appeal from the denial of an application to substitute custodial service for agency service at a station on the line of the railroad except during the months of September and October, that no factual or legal conclusion other and different than was arrived at in that case is possible.

The conclusion therein appearing and the principles and reasoning on which they are based as disclosed by the opinion in that case are adopted as determinative of the issues in this case.

As in that case we conclude that the order of the railway commission denying the application of the carrier was arbitrary, unreasonable, and contrary to law.

The order is therefore reversed and the cause remanded with directions to the commission to grant the authority requested in the application.

REVERSED AND REMANDED WITH DIRECTIONS.

BARBARA ZUTAVERN, APPELLANT, V. RICHARD ZUTAVERN, APPELLEE.

52 N. W. 2d 254

Filed February 29, 1952. No. 33111.

1. **Marriage: Fraud.** Marriage is a civil contract which, if procured by fraud, may, under certain conditions, be set aside.
2. ———: ———. Fraud sufficient to vitiate a marriage must go to the essence of the marriage relation.
3. ———: ———. The fraud that vitiates a marriage contract does not lend itself to definitive statement automatically resolving every case.
4. **Equity.** The equitable doctrine of clean hands applies only to bad conduct in the very transaction in litigation. If a party is not guilty of inequitable conduct toward the other person concerned in that transaction, his hands are as clean as a court can require.
5. **Marriage: Fraud.** If a man is induced to marry a woman who he knows or believes to be pregnant, believing and relying upon false statements made to him by her that he is the father of the child with which she is pregnant, when unknown to him her condition was caused by another, the marriage may be annulled for the fraud, if it has not been ratified with knowledge thereof, and the fact that the husband had sustained sexual intercourse with his wife before they were married will not bar the husband from resorting to and having the benefit of the remedy of annulment of the marriage.
6. **Husband and Wife.** In an action in which the legitimacy of a child born in wedlock is in issue, the testimony of the husband and wife is incompetent on the question of access, and neither the husband nor wife should be permitted to testify to collateral facts from which an inference of access or nonaccess might be drawn.
7. **Divorce.** A litigant may not have the benefit of condonation unless it is properly pleaded.
8. ———. In an action by the husband to annul a marriage, the wife is entitled to alimony pendente lite and counsel fees, and the fact that the husband proceeds by cross-petition instead of an original suit does not affect the rule.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

*John S. Samson,* for appellant.

*James R. Kelly* and *Merle M. Runyan,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This case was brought by appellant to secure a divorce from appellee. He, by cross-action, asked that the marriage of the parties be annulled.

Appellant alleged residence in Douglas County and marriage with appellee on September 3, 1950; that appellee had been guilty of extreme cruelty towards her; and that she became the mother of a child on January 26, 1951. Appellee admitted the residence of appellant, the marriage of the parties, the birth of the child as alleged by appellant, and that he had sexual intercourse with her commencing in July 1950. Appellee traversed the other claims of appellant and specifically denied that he was the father of the child. He alleged that appellant on about August 25, 1950, falsely informed him that she was pregnant; that he was the cause of her condition; that she implored appellee to marry her; that he believed, relied, and acted upon the information given by her, and solely because thereof consented to and entered into marriage with her; that she was pregnant then and at the time of the marriage as the result of her sexual indulgences with a male other than appellee long prior to his association with her; and that he had not lived or cohabited with her after he obtained knowledge of the fraud by which his consent to the marriage was obtained. Appellee asked that the marriage be adjudged void and that he be declared not to be the father of the child. Appellant replied that appellee was estopped from denying paternity of the child born to her after the marriage of the parties because of his illicit relations with her before the marriage.

The district court found that the consent of appellee to the marriage was obtained by the fraud of appellant as alleged by appellee; denied appellant a divorce; and rendered a decree of annulment of the marriage.

This appeal is a challenge of the correctness of the findings and decree.

This case presents no dispute as to any fact material to its disposition. The record advises that appellant reached the age of 18 years on August 17, 1950, and appellee was 18 years of age September 1, 1950. They attended the fourth grade in public school in Dunning. It is shown that they did not have any association after that until July 23, 1950, or for a period of more than 8 years before that date. They met and were together during the afternoon and evening of July 23, 1950, and on the evening of July 25, 1950. These meetings were uneventful, but commencing with July 26, 1950, according to appellant, or on July 29, 1950, as stated by appellee, and continuing through August 19, 1950, they had frequent and unrestrained acts of incontinence. Their sexual indulgences were nightly on and after July 26 to August 8, 1950. Appellant missed her menstrual period at the end of July. She was going to her home in Alliance on August 8, and shortly before that date she told appellee that she felt that he had got her pregnant. They discussed that possibility and the matter of their getting married. After she arrived home she consulted a doctor. Appellee visited her at Alliance on August 12, she told him that the doctor had said that she was pregnant, and she then advised appellee that he was the cause of her condition. She made this claim to him on several occasions before September 3, 1950. This was the reason he consented to and did marry her on that date.

Appellant, at the suggestion of appellee and his mother, sought and procured the advice of another doctor on September 30, 1950. She told appellee on the evening of that day or the morning of the following day that the physician advised her that she would be delivered of a child in February 1951. Appellee became convinced at that time from the information she furnished him that the condition of appellant was the re-

sult of her improper relations with a person other than appellee, and he so informed her. He asked and demanded that she leave the home where they were living. This she did and they have since been separated. She gave birth to a child of normal full period growth that exhibited no symptoms or evidence of premature delivery on January 26, 1951, exactly six calendar months after she said she first indulged in sexual intimacy with appellee.

Appellant contends that appellee, who married her upon her solicitation after he had sexual acts with her, cannot maintain proceedings for annulment of their marriage, although he was induced to marry her because he was deceived by deliberate false representations, on her part, that she was with child by him and he believed, relied, and acted upon the truth of her statements until he had convincing evidence that her condition was the result of her incontinence long prior to the time she submitted to his embraces.

It is a mandate of the Legislature of this state that marriage be considered a civil contract; that consent thereto by competent parties is essential; and in case consent of one of the parties to the marriage is obtained by fraud, and there has been no voluntary cohabitation of the parties after discovery of the fraud, the marriage shall be voidable at the instance of the one upon whom the fraud was inflicted. §§ 42-101 and 42-118, R. S. 1943. It is obvious that a marriage contract induced by fraud may, under some circumstances, be voidable and annulled at the instance of the victim of the imposition. What amounts to a fraudulent contract, as these terms are used in the statute to express a recognized condition justifying the annulment of a marriage, has not been often considered or extensively discussed in decisions of this court. The fraud that vitiates a marriage contract does not lend itself to definitive statement automatically resolving every case. It is not every kind and degree of fraud that affords cause for setting aside the contract.

The law differentiates between fraud in the essentials of the marriage relation and deceptive arts to which some persons resort with a view to an advantageous marriage by placing their accomplishments, character, and circumstances in a too optimistic view. While these constitute a species of fraud, they do not afford a basis for destruction of the marriage. However, if there is a deception as to some fact whose existence or non-existence may affect in some certain way the very essence of the marriage relation, resulting in a lawful marriage which practically operates as a fraud upon the deceived spouse, and the existence or non-existence of the fact thus concealed or misrepresented must operate as between the parties to the marriage to prevent some essential purpose thereof and result in a practical destruction of that relation, there exists such fraud as the law contemplates and such as renders the marriage contract subject to annulment.

In Hudson v. Hudson, 151 Neb. 210, 36 N. W. 2d 851, this court said: "Marriage is a civil contract which, if procured by fraud, may, under certain conditions, be set aside." Robertson v. Roth, 163 Minn. 501, 204 N. W. 329, 39 A. L. R. 1342, considered this subject and stated the rule as follows: "In order to constitute such fraud there must be something that destroys the consent which blots out all semblance of contract—or it must impose, at the time of the marriage, upon the one wronged, burdens and obstacles wholly unexpected and of such character that they tend to the destruction of domestic happiness and promote humiliation disclosing a situation intolerable to society and detrimental to the marriage relation." See, also, Brown v. Scott, 140 Md. 258, 117 A. 114, 22 A. L. R. 810; Marshall v. Marshall, 212 Cal. 736, 300 P. 816, 75 A. L. R. 661; Hanson v. Hanson, 287 Mass. 154, 191 N. E. 673, 93 A. L. R. 701; Lyman v. Lyman, 90 Conn. 399, 97 A. 312, L. R. A. 1916E 643; 35 Am. Jur., Marriage, § 87, p. 235.

In consonance with the principle stated above, there

is much agreement that antenuptial pregnancy by another man, if concealed by the wife from her husband who was himself innocent of improper relations with her, is a fraud upon him justifying annulment of the marriage. Jackson v. Ruby, 120 Me. 391, 115 A. 90, 19 A. L. R. 77; Annotation, 13 A. L. R. 1435. Appellee cannot claim the advantage of this doctrine because of his participation in and contribution to immoral conduct of appellant before the marriage, and her counsel insists that the existence of that fact creates an obstacle, insurmountable as a matter of law, to the dissolution of the marriage tie on account of the fraud charged.

The position of appellant is not without support of eminent authorities including: Arno v. Arno, 265 Mass. 282, 163 N. E. 861; Brandt v. Brandt, 123 Fla. 680, 167 So. 524; Lindquist v. Lindquist, 130 N. J. Eq. 11, 20 A. 2d 325; Westfall v. Westfall, 100 Or. 224, 197 P. 271, 13 A. L. R. 1428; Annotation, 11 A. L. R. 931; 55 C. J. S., Marriage, § 34, p. 873; 35 Am. Jur., Marriage, § 139, p. 264. A contrary view is strenuously maintained by many other courts. The exact problem presented in this regard by this case has not had consideration or decision by this court.

The cases denying relief to the innocent victim of the fraud in a situation such as is presented by this case may in general be placed in two groups. Those that deny relief on the ground that the husband, legally speaking, does not come into court with clean hands and may not expect equity to aid him. This is neither logical nor convincing. The gravamen of the case of the husband is not unchastity but the fact that his wife, by reason of a too free manner of life with another, has become pregnant and disqualified to properly enter into or perform the marriage relation with him. The parties are in no sense in pari delicto. The matter in litigation is the marriage contract. The antecedent illicit relations form no part of the contract. They were only incidental circumstances which, while possibly in-

fluencing the appellee to enter into it, were not influences brought to bear by him to induce the appellant to do so. They gave appellant no rights which appellee is now trying to avoid, and imposed no obligation which he is trying to evade. His conduct in consenting to marry appellant and in doing so, believing as he did that she was pregnant by him, was not only without fault on his part, but most commendable. It was without advantage to him, if the child was not his, as it was not, but of infinite importance to her as a possible means of protecting her reputation and the name and good standing of her child. His willingness to do all he could to repair the wrong he believed he had done her in being the cause of her condition and to accept the burden which his moral duty, under the circumstances as they were presented to him, called upon him to bear, did not make his hands unclean in the matter of the contract from which he seeks relief, nor for that matter as respects appellant. The equitable doctrine of clean hands extends only to bad conduct in the very transaction in litigation. If a party is not guilty of inequitable conduct toward the other person concerned in that transaction, his hands are as clean as the court can require. Arndt v. Arndt, 336 Ill. App. 65, 82 N. E. 2d 908.

In the second group are those determinations asserting that the husband, knowing of his wife's unchastity and pregnancy, was put upon his inquiry as to her condition and the paternity of the child; that in the pursuit of his inquiry he was, in view of what he knew, put on his guard as to the confidence to be reposed in her word, so that he was not entitled to rely upon it but was bound to pursue searching independent investigations; and that because of his experience with and participation in the incontinence of the woman, he was thereby deprived of any right to complain of having been deceived by her false assurance that he was the only fruitful participant in her illicit intercourse.

The law generally affirms that one who has intention-

ally deceived the other to his prejudice may not be heard to say in defense of the charge of fraud that the innocent party ought not to have trusted him or was guilty of negligence in so doing. This is especially true where there is a relation of trust and confidence between parties contemplating marriage and where knowledge as to the truth or falsity of the alleged misrepresentation is peculiarly within the possession of the defrauding party.

It is difficult to subscribe to the doctrine that it is, in any situation, the duty of a man to subject the woman he intends to marry to the unspeakable inquisition implicit in the view expressed in this line of decisions. The hypothesis that a man is not justified in accepting the statement of a woman, under such circumstances, that he is the father of the child she is bearing, and that he must make searching independent inquiry elsewhere as to her chastity and truthfulness, is an assault on the truthfulness and all decency in every woman that may have been imprudent enough to anticipate with her lover the rights of the marriage relation. The probable futility of the suggested investigation is almost assured because the woman involved would in most cases be the only source of information. Finally, for what purpose should such an investigation be made and extreme care and caution exercised before accepting the representations made by the woman if it would be of no avail and if the law would still impose its forbidding demands because of the single fact that the man had sustained improper relations with her before the marriage.

The rule supported by a preponderance of authority and the weight of reason is that if a man is induced to marry a woman who he knows or believes to be pregnant, believing and relying upon false statements made to him by her that he is the father of the child with which she is pregnant, when unknown to him her condition was caused by another, the marriage may be annulled for the fraud, if it has not been ratified after knowledge of the fraud, and the fact that the husband had

sustained sexual intercourse with his wife before they were married will not bar the husband from resorting to and having the benefit of the remedy of annulment of the marriage. Yager v. Yager, 313 Mich. 300, 21 N. W. 2d 138; Jackson v. Ruby, *supra;* Winner v. Winner, 171 Wis. 413, 177 N. W. 680, 11 A. L. R. 919; Wallace v. Wallace, 137 Iowa 37, 114 N. W. 527, 126 Am. S. R. 253, 14 L. R. A. N. S. 544; Shatford v. Shatford, 214 Ark. 612, 217 S. W. 2d 917; Morris v. Morris, 40 Del. 480, 13 A. 2d 603; Lyman v. Lyman, *supra;* Annotation, 11 A. L. R. 931.

The concealment and untrue statement concerning the father of the child of appellant went directly to the essentials of the marriage contract and constituted a serious fraud on appellee. A woman who is incapable of bearing a child at the time of the marriage by reason of her pregnancy by another man is disqualified to carry out an important part of the contract into which she enters, and any representation which induces a belief that she is in a marriageable condition is a false statement of a fact material to the contract and is sufficient reason to avoid the marriage. The serious consequences of a denial of relief to the defrauded husband in such a situation are many and permanent. There could not be a family which would be advantageous to society or the state after the man discovered he had been victimized to furnish the woman a way out of her difficulties. He could not treat as a wife a woman whom he knew had traded upon his effort to correct a supposed wrong to shield her from the consequences of her unchastity with another man. A just or wise public policy cannot require in the name of a home the maintenance by the husband of an establishment presided over by the one who deceived him as to the paternity of a child, the offspring of another, who daily sits at his table, bears his name, and who, in the absence of a testamentary disposition, would inherit his property. Appellee was entitled under

the facts of this case to be relieved from the contract of marriage and its serious consequences.

Another objection of appellant is that the evidence of nonaccess of appellee to her during the period of gestation of the child born to her on January 26, 1951, consisted of testimony given by the parties to the case; that the presumption of legitimacy of a child born in lawful wedlock may not be rebutted by any information, the source of which is either the husband or the wife; and that all testimony of the husband and wife which has a tendency to prove or disprove legitimacy is incompetent. There is no doubt as to the existence of this rule of law. It was proclaimed more than a century ago in England and has been adopted and applied by many of the courts of this country. It is the rule in Nebraska. Schmidt v. State, 110 Neb. 504, 194 N. W. 679, stated it in this language: "In an action in which the legitimacy of a child born in lawful wedlock is an essential issue of fact, neither the declaration nor the testimony of husband or wife is competent on the question of access, nor should either testify to collateral facts from which an inference of access or nonaccess may be drawn; * * *." See, also, In re Estate of McDermott, 125 Neb. 179, 249 N. W. 555; Morris v. Morris, *supra;* Annotation, 60 A. L. R. 380; Annotation, 89 A. L. R. 911. This rule of law is not of controlling importance in this case because there is much unchallenged proof of nonaccess of appellee until long after the pregnancy of appellant from sources other than the husband or the wife.

There is much said by appellant on the subject of condonation or that the marriage was ratified after knowledge of all of the facts by subsequent voluntary cohabitation of the parties. The pleadings are not sufficient to make this an issue. Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808. The evidence relied upon to establish it is insufficient. § 42-118, R. S. 1943; Sweeney v. Sweeney,

96 Vt. 196, 118 A. 882, 26 A. L. R. 1066; Annotation, 26 A. L. R. 1068.

The district court at the conclusion of the trial required appellee to pay an amount to compensate counsel for appellant for his expenses and services. This is the subject of the cross-appeal. The order complained of was authorized and justified. §§ 42-307 and 42-308, R. S. 1943. In Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. N. S. 767, it is said: "* * * it is well settled that in an action by the husband to annul a marriage the wife is entitled to alimony pendente lite and counsel fees, and the fact that the defendant proceeds by cross-petition instead of an original suit does not change the rule." In Nelson v. Robinson, 154 Neb. 64, 46 N. W. 2d 892, this court recently affirmed this pronouncement in this manner: "In Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. N. S. 767, the court held that in an action to annul a marriage brought by the husband, the wife is entitled to alimony pendente lite and counsel fees, that the marriage was valid until annulled by the court, and that until such time the husband was liable for the expenses of his family. The court also allowed a reasonable attorney's fee for the services of the defendant's attorneys in the Supreme Court." The cross-appeal should be, and is denied.

The statement in Gard v. Gard, 204 Mich. 255, 169 N. W. 908, 11 A. L. R. 923, is applicable to appellant and this appeal: "The appeal has been prosecuted in the utmost good faith. The question was an open one in this state. Defendant had the right to take the judgment of this court upon it."

The judgment of the district court should be, and it is affirmed. Appellant is entitled to a reasonable allowance for her attorney for services in this court in the sum of $250 to be taxed as costs, and the costs in this case should be, and are taxed to the appellee.

AFFIRMED.

FRANK V. LOVENBURG, APPELLEE, V. LOTTIE JUSTICE ET AL., APPELLEES, IMPLEADED WITH LAWRENCE M. LOVENBURG, APPELLANT.
51 N. W. 2d 895

Filed February 29, 1952. No. 33120.

1. **Reformation of Instruments.** In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties.
2. ———. Reformation of an instrument to correct a mistake will not be accorded unless the intent and agreement which it will express as reformed were concurrent in the minds of the parties to and including the time of its execution.

APPEAL from the district court for Keith County: JOHN H. KUNS, JUDGE. *Affirmed.*

*W. I. Tillinghast,* for appellant.

*George B. Hastings,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action to partition land. The deed upon which the title rests named L. M. Lovenburg and Chas. Lovenburg as grantees. L. M. Lovenburg, as Lawrence M. Lovenburg, cross-petitioned, seeking a reformation of the deed to remove the name of Chas. Lovenburg as grantee, and to quiet title. The trial court denied and dismissed the cross-petition. The named defendant appeals. We affirm the judgment of the trial court.

The plaintiff herein is one of the heirs at law of Chas. Lovenburg. Chas. Lovenburg will be referred to herein as Charles. L. M. Lovenburg will be referred to herein as Lawrence.

Charles was a bachelor uncle of Lawrence. Their relations were friendly. Charles died in August 1948. Some of the evidence referred to herein was admitted

over objections as to its competency. No assignments of error are made as to that, hence we summarize the evidence received by the trial court as it appears in the bill of exceptions.

The land involved here, 80 acres in Keith County, was owned by a Mr. Campbell of Lincoln. He had a brother at Ogallala. Lawrence contacted the brother with reference to buying the land. Lawrence did not have enough money to buy it. The brother and Lawrence then met and a contract was drawn to purchase the land for $8,000. Neither the contract nor its terms are in evidence. The brother of the owner testified the land was sold to Lawrence and Charles. On May 31, 1946, Lawrence made his check to the owner for $1,000. It does not clearly appear but apparently the contract was sent to Lincoln for Mr. Campbell's approval. In any event the $1,000 check was endorsed by the owner of the land and paid.

Charles had a number of government series E bonds made payable to himself or Lawrence. On June 13, 1946, Charles cashed sufficient of the bonds to secure $3,500 and on that date issued his check to Lawrence for that amount. Lawrence cashed the check. Appearing in the lower left-hand corner are the words "For Land deal."

The deed involved here was prepared in the law office of L. A. DeVoe of Ogallala. Lawrence, the brother of the owner, Mr. DeVoe, and Mr. DeVoe's son were present.

The grantees were named as "L. M. Lovenburg and Chas. Lovenburg." The same names were used in the habendum clause. The deed was made subject to a $2,500 mortgage which the "grantees" assumed and agreed to pay. The deed was sent to Lincoln where it was executed and acknowledged by the owner and his wife. On June 15, 1946, Lawrence issued his checks to L. A. DeVoe for taxes, abstract, etc., in the amount of $569.75, and to the owner for $3,930.25. The $3,500 received from Charles was used to make this payment.

The deed was delivered to Lawrence, who had it recorded on June 20, 1946, and then placed it in his safety deposit box and retained it. Thereafter he took possession of the land, accounted to no one for the proceeds, and paid the taxes as they accrued. On September 4, 1946, Lawrence paid $2,527.50, the principal and interest due on the mortgage.

Lawrence, resisting the partition action, by cross-petition alleged that the name of Charles "was inadvertently and erroneously inserted" in the deed and "without the intent, consent, wish or knowledge" of Charles; that Charles never owned any interest in the land; and that he, Lawrence, was sole owner.

The trial court dismissed the cross-petition. Lawrence assigns that as error here.

Charles appears to have been present when the contract was being negotiated. A witness to the contract testified that Charles told him at that time, " 'I have got a bunch of bonds, * * * as they will never do me any good, * * * I am going to give them up for Lawrence. * * * He needs that place.' " As to a time preliminary to the contract, Lawrence testified that his uncle told him (referring to the bonds), " 'There's $3,500 I will give you if you can handle the deal. * * * I will cash those and give you the money.' " He testified that "they were cashed and given to me to help pay for this land."

Lawrence testified that he knew the contents of the deed before it was sent to Lincoln for execution; that he knew Charles was named as a grantee; that he directed that that be done of "my own free will"; that it was not put there by mistake; and that it was put in "in protection of those bonds," and so that nobody would think he was "doing anything crooked."

The deed was drawn by Mr. DeVoe's son. He testified for plaintiff that the deed was drawn as directed by Lawrence, as did one other witness, but in the light of Lawrence's own testimony that need not be set out here.

On cross-examination, defendant developed evidence

that the scrivener asked Lawrence if he wanted a "joint deed," explaining that with such a deed "title rests in the survivor in the case of the death of either party to the deed," and that Lawrence told him he did not want "a survivorship deed." Lawrence then testified that the scrivener did not tell him what "a joint survivorship deed" was and that he did not tell him he did not want that kind of a deed.

Lawrence now testifies that the deed was not made out the "way it was supposed to be"; that what he wanted was a survivorship deed; and that the grantees should have been named "or" and not "and" just like the bonds were made out.

The applicable rules are:

"In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties." Sutherland State Bank v. Dial, 103 Neb. 136, 170 N. W. 666. See, also, Wheeler v. Brady, 126 Neb. 297, 253 N. W. 338; Oft v. Dornacker, 131 Neb. 644, 269 N. W. 418; Otto v. L. L. Coryell & Son, 141 Neb. 498, 3 N. W. 2d 915; Kula v. Kula, 149 Neb. 347, 31 N. W. 2d 96.

"Reformation of an instrument to correct a mistake will not be accorded unless the intent and agreement which it will express as reformed were concurrent in the minds of the parties to and including the time of its execution." Nebraska Loan & Trust Co. v. Ignowski, 54 Neb. 398, 74 N. W. 852.

It is patent that Lawrence has produced no evidence to meet the requirements of these rules. His own evidence shows that the deed fully expressed his intent at the time the deed was drawn. Although not within the scope of his cross-petition, his contention at the trial that he was supposed to have a deed in joint tenancy with right of survivorship is negatived by his own testimony of the directions he gave as to the grantees to be

named in the deed. There is no evidence that he then either intended to secure the benefits or assume the burdens of such a deed. He has produced no evidence as to the intent of the other contracting parties so far as the deed is concerned, save that which is in the deed itself.

The trial court did not err in dismissing the cross-petition. The judgment of the trial court is affirmed.

AFFIRMED.

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GROVER STAPLEMAN, APPELLANT, V. HERBERT H. HANN, WARDEN OF NEBRASKA STATE PENITENTIARY, LINCOLN, LANCASTER COUNTY, NEBRASKA, ET AL., APPELLEES.
51 N. W. 2d 891

Filed February 29, 1952. No. 33123.

1. **Habeas Corpus.** A petition for a writ of habeas corpus must state the facts which it is contended constitute the illegal restraint.
2. ———. A petition which states as a conclusion that a petitioner is illegally restrained of his liberty is not sufficient as a basis for the issuance of a writ of habeas corpus.
3. ———. It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it and if it fails to state a cause of action to enter an order denying a writ.

APPEAL from the district court for Lancaster County: HARRY ANKENY, JUDGE. *Affirmed.*

*Grover Stapleman, pro se,* for appellant.

*Clarence S. Beck,* Attorney General, and *Homer L. Kyle,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

Grover Stapleman, petitioner and appellant herein, on August 8, 1951, filed in the office of the clerk of the

district court for Lancaster County, Nebraska, a petition for a writ of habeas corpus directed to Herbert H. Hann, Warden of the penitentiary of the State of Nebraska, respondent, and other named respondents.

At the time the petition was filed the petitioner was serving a sentence of eight years in the state penitentiary for the crime of rape of which he had been duly convicted in the district court for Hall County, Nebraska, which conviction had been affirmed by this court.

On August 14, 1951, one of the judges of the district court examined the petition and entered an order denying the writ and dismissing the petition on the ground that the petition did not state facts sufficient to constitute a cause of action for the allowance of a writ. Notice of appeal was duly filed by the petitioner.

The brief of appellant contains numerous assignments of error but the only question for determination is that of the sufficiency of the petition to state a cause of action, or in other words, did the petition contain sufficient allegations of fact which if taken as true would entitle him to discharge from his imprisonment.

The appropriate rule is that a petition for a writ of habeas corpus must state the facts which it is contended constitute the illegal restraint. It is not sufficient to allege that the petitioner is illegally restrained of his liberty. State ex rel. Distin v. Ensign, 13 Neb. 250, 13 N. W. 216; In re Application of Tail, 145 Neb. 268, 16 N. W. 2d 161.

If on examination it is found that the petition fails to state a cause of action it is the duty of the district court to enter an order denying a writ. In re Application of Tail, 144 Neb. 820, 14 N. W. 2d 840; In re Application of Tail, 145 Neb. 268, 16 N. W. 2d 161; Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932; Swanson v. Jones, 151 Neb. 767, 39 N. W. 2d 557; In re Application of Dunn, 150 Neb. 669, 35 N. W. 2d 673; Truman v. Hann, 154 Neb. 501, 48 N. W. 2d 418.

The petition which is much too lengthy to summarize

herein contains no allegations of fact which if true would entitle petitioner to the relief prayed. The district court correctly so held and further correctly dismissed the petition.

The judgment is therefore affirmed.

AFFIRMED.

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CHRIS STAHL, APPELLEE, V. CLIFFORD J. ALLCHIN, APPELLANT.
52 N. W. 2d 251

Filed February 29, 1952. No. 33127.

1. **Injunctions.** A litigant cannot successfully invoke the extraordinary remedy of injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate.
2. **Judgments: Actions.** An action to secure a declaration of rights under the Uniform Declaratory Judgments Act is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto, and courts should, under most circumstances, dismiss such an action without prejudice, whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded.

APPEAL from the district court for Kimball County: JOHN H. KUNS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

*Torgeson, Halcomb & O'Brien,* for appellant.

*Van Steenberg & Myers,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

On July 12, 1951, plaintiff filed this action in the district court. His petition purportedly contained two

causes of action. The first sought to enjoin defendant from trespassing upon certain described farm lands, except 60 acres thereof then in wheat to be harvested by defendant during the summer of 1951, and thereafter to perpetually enjoin defendant from also trespassing thereon. It also sought to temporarily enjoin defendant from in any manner molesting plaintiff in his peaceful possession of the premises pending the trial of both causes of action.

The second cause of action, relying substantially upon the same allegations as alleged in the first, sought to have immediately declared and established plaintiff's exclusive right to possession of the premises and to plant and harvest certain crops thereon during the fall of 1951, alleging that unless such determination is so made he will suffer irreparable injury by the continuing trespasses of defendant and that he has no adequate remedy at law since he, the plaintiff, was rightfully in possession of the premises.

In both causes of action plaintiff also prayed for general equitable relief.

His right to the foregoing relief was predicated primarily upon the provisions of a written recorded lease allegedly executed by the owner Alice S. Palmer as lessor, with plaintiff as lessee, on November 27, 1950, for a term from March 1, 1951, to September 1, 1953, of which defendant had notice and knowledge, but for reasons hereinafter discussed refused to recognize as valid and effective.

After a hearing the trial court denied plaintiff's application for a temporary injunction. Defendant demurred to both causes of action for defect of parties plaintiff or defendant, misjoinder of causes of action, and generally for failure to state facts sufficient to constitute a cause of action. His demurrer was subsequently overruled and defendant answered, denying generally plaintiff's right to any relief upon either cause of action and affirmatively alleging that defendant had at all times

involved since August 1950 been in open, peaceful, and lawful possession of the premises upon which plaintiff was and had been a trespasser.

Defendant's alleged possession and right thereto was predicated upon the provisions of a written recorded lease executed on behalf of the owner Alice S. Palmer as lessor, with one Wayne A. Enyeart as lessee, on December 15, 1948, for a term from March 1, 1949, to March 1, 1952. On August 29, 1950, Wayne A. Enyeart allegedly, for valuable consideration recited therein, assigned such lease and certain crops on the premises in writing to defendant, subject to the landlord's approval allegedly obtained, and that defendant then went into possession thereunder prior to the execution of plaintiff's lease on November 27, 1950.

After a hearing upon the merits the trial court rendered a decree finding generally for defendant and against plaintiff on the first cause of action, dismissing the same, and finding generally for plaintiff and against defendant on the second cause of action. In other words, the decree found in effect that defendant was rightfully in possession under a proper assignment approved by the lessor and that under the circumstances plaintiff could not by injunction obtain possession, thereby putting defendant out of possession as prayed in plaintiff's first cause of action. However, the decree undertook to settle the controversy by concluding that plaintiff under provisions of the leases and circumstances involved was entitled to possession of all the land on March 1, 1952, and also had a right to enter and sow fall crops in the summer-fallowed ground in the fall of 1951 to mature after March 1, 1952, all purportedly as prayed in plaintiff's second cause of action.

Defendant's motion for new trial was overruled and he appealed, assigning substantially, insofar as important here, that the judgment on the second cause of action was contrary to law. We sustain the assignment. On the other hand, plaintiff did not file a motion for

new trial but cross-appealed, assigning substantially, insofar as important here, the trial court erred in dismissing plaintiff's first cause of action. We conclude that the assignment has no merit.

The record discloses without dispute that at the commencement of this action and at all times prior thereto, beginning in March 1951, both parties claimed the right to possession of the premises involved. Plaintiff, claiming the right to possession under the written lease executed on November 27, 1950, for a term from March 1, 1951, to September 1, 1953, undertook during the temporary absence of defendant to cultivate portions of the land and plant spring barley on the premises in March 1951. However, defendant, then claiming to have been in peaceful possession under and since his August 29, 1950, assignment of the written lease executed on December 15, 1948, for a term from March 1, 1949, to March 1, 1952, almost immediately notified plaintiff of his possession and rights thereunder, undertook to prevent plaintiff from planting such crops, and went forward with his own cultivation and planting thereon. As a matter of course, in the light thereof plaintiff never was in peaceful possession as alleged in his petition, but under his first cause of action was simply attempting to obtain by injunction such possession and put defendant out of his claimed possession.

It is well established that under such circumstances injunction could not be so invoked by plaintiff. It has long been the rule that: "A litigant cannot successfully invoke the extraordinary remedy of injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate." Hollinrake v. Neeland, 94 Neb. 530, 143 N. W. 809; Reed v. Wellman, 104 Neb. 292, 177 N. W. 170; Vance v. Sumner, 119 Neb. 630, 230 N. W. 490. See, also, Mohat v. Hutt, 75 Neb. 732, 106 N. W. 659, and Vance v. Henderson, 141 Neb. 766, 4 N. W. 2d 833, so

holding under circumstances singularly comparable with those at bar.

We therefore conclude as a matter of law that the trial court properly denied plaintiff injunctive relief and correctly dismissed plaintiff's first cause of action. Fenster v. Isley, 143 Neb. 888, 11 N. W. 2d 822, relied upon by plaintiff is clearly distinguishable upon the facts. Therein defendant was truly a trespasser because he "was neither in possession nor did he have a right to possession."

With regard to the second cause of action, plaintiff argued that he sought thereby to have judicially declared his right to possession of the premises and certain crops planted thereon in 1951; had a right to have the controversy between plaintiff and defendant over the question of possession under their respective leases settled; and their rights, status, and duties judicially declared, as provided in the declaratory judgments act. Viewed in such light, we conclude as a matter of law, without deciding questions of fact, that plaintiff was not entitled to the relief demanded and that the granting thereof by the trial court was erroneous for the reason that necessary parties were not impleaded in the action.

In that connection both leases were concededly upon their face executed and delivered at different times to different lessees by or for the same lessor, who was not made a party to this action. Wayne A. Enyeart was lessee in the first lease, and on August 29, 1950, for valuable consideration involving no small amount, assigned said lease and certain crops to defendant upon condition that the lessor approve such assignment, and defendant allegedly went into possession thereunder. Whether or not such assignment was approved by the lessor is in dispute, and the assignor was not made a party to this action. It will be noted that plaintiff was lessee in the other lease executed and delivered after assignment of the first and after possession thereunder had been allegedly taken by defendant. Both leases

were executed on like farm lease forms, but both contained different typewritten provisions which appear to be conflicting and required construction in some material respects. Further, both leases purported thereby to lease the same premises to different lessees for the same period from March 1, 1951, to March 1, 1952. In such a situation, Wayne A. Enyeart, defendant's assignor, and the lessor of both leases as well were necessary parties in order for plaintiff to obtain a declaratory judgment. This is true because the court could not declare the rights of plaintiff and defendant without determining the correlative rights, duties, and obligations of the assignor and lessor, which the court had no jurisdiction to do.

The situation is controlled by the holdings in Redick v. Peony Park, 151 Neb. 442, 37 N. W. 2d 801, which opinion cites and discusses authorities and comparable cases from this and other jurisdictions. Therein this court held that: "Section 25-21,159, R. S. 1943, puts the duty upon the plaintiffs in the first instance of joining as parties all persons who have or claim any interest which would be affected by the declaration. * * *

"An action to secure a declaration of rights is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto, and courts should, under most circumstances, dismiss such an action without prejudice, whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded.

"There must be an actual and bona fide controversy as to which the judgment will be res adjudicata. Such a case requires that all the interested parties shall be before the court.

"The Uniform Declaratory Judgments Act does not contemplate the adjudication of interests of a party over which the court has no jurisdiction."

Other matters were presented and argued in the briefs, but in the light of the foregoing conclusions they require no discussion.

It follows for the reasons heretofore stated that the judgment of the district court dismissing plaintiff's first cause of action should be and hereby is affirmed; and that the judgment upon the second cause of action should be and hereby is reversed, and the cause is remanded with directions to dismiss the same without prejudice. All costs in the district court and in this court are taxed to plaintiff.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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SAFEWAY CABS, INC., A CORPORATION, APPELLANT, CHECKER CAB CO., INC., A CORPORATION, ET AL., INTERVENERS AND APPELLANTS, V. MICHAEL O. HONER, APPELLEE.
52 N. W. 2d 418

Filed March 7, 1952. No. 33000.

1. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the Nebraska State Railway Commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
2. **Motor Carriers: Public Service Commissions.** "Willful failure," as used in section 75-238, R. R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform.
3. **Corporations.** A corporation is a complete entity, separate and distinguishable from its stockholders and officers.
4. **Motor Carriers.** Subdivision (8), section 75-223, R. R. S. 1943, defines a motor carrier, as used in the act, to mean "any person owning, controlling, managing, operating, or causing to be op-

erated, any motor-propelled vehicle used in transporting passengers or property for hire over any public highway in this state."

5. ———. The term "motor carrier," as defined in the act, is a term inclusive of both a common carrier and a contract carrier.
6. ———. The term "motor carrier" is intended to include those motor carriers which under the act have or are required to have either a certificate of public convenience and necessity as a common carrier or a permit as a contract carrier.
7. **Statutes.** In construing a statute, effect must be given, if possible, to every word, clause, and sentence, so that no part of its provisions will be inoperative, superfluous, void, or insignificant.
8. ———. When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted.
9. **Motor Carriers.** A majority stockholder of a corporate motor carrier is not a motor carrier within the definition of motor carrier in subdivision (8), section 75-223, R. R. S. 1943.

APPEAL from the Nebraska State Railway Commission. *Orders appealed from reversed and remanded with directions.*

*Kennedy, Holland, DeLacy & Svoboda, Swenson, Viren & Turner,* and *Frost, Peasinger & Meyers,* for appellants.

*Pilcher & Haney* and *Loyal G. Kaplan,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

We are here presented with appeals from orders of the Nebraska State Railway Commission denying a complaint to terminate a certificate of convenience and necessity and granting in part an application to transfer the certificate. We reverse the orders in both matters.

The Nebraska State Railway Commission will be hereinafter referred to as the commission.

Safeway Cabs, Inc., hereinafter referred to as Safeway, was the complainant in the first matter designated as F. C. 875. In the second matter Safeway protested the granting of the application. This is designated as

B-595. The two matters proceeded concurrently, were heard separately in fact but upon a consolidated record, and were determined by the commission in a joint order.

In F. C. 875, other cab companies joined as interveners, without, however, changing the issues to be determined here. Likewise there were several protestants in B-595. As to the issues presented here, no reference need be made to other parties. Also in F. C. 875, there was an amended complaint seeking to reform the certificate so as to place a further limitation in it. The complaint as to that matter was denied. As we view the issues here, no further reference need be made to that question.

The application for transfer in B-595 was filed January 18, 1949. The formal complaint in F. C. 875 was filed February 1, 1949. Both matters have to do with a certificate of public convenience and necessity issued February 15, 1938, to Michael O. Honer, hereinafter called Honer. Different questions are presented by the two proceedings. They will be determined separately. Both matters are considered subject to the rule that "On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the Nebraska State Railway Commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552. See, also, In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157.

On February 15, 1938, the commission issued a certificate of public convenience and necessity to Honer granting "* * * authority to operate motor vehicles for passenger hire in the City of Omaha, Nebraska under the name of Checker Cab Company, subject to and in conformity with Resolution No. 137, Supplemental Order No. 1." Resolution No. 137, supplemental order No. 1, was in part: "It is further ordered that

on and after June 1, 1937, all certificates of public convenience and necessity heretofore granted to and in the name of a service company to operate motor cabs or taxicabs not owned by such service company, shall be null and void and the owners of such motor cabs or taxicabs shall cease to operate unless such owners hold a certificate of public convenience and necessity from this Commission, and in that event such owners shall not operate except through such service company, unless authorized to do so by the Commission." The certificate was for an "owner-driver" operation.

In January 1949, Honer entered into an agreement to sell the certificate and his cab to one Robert S. Gillard, hereinafter referred to as Gillard. The agreed consideration for the certificate was $100, and for the cab $1,000. The application in B-595 was for the purpose of consummating that transaction.

The question presented by F. C. 875 arose in point of time prior to the issues presented by B-595. We first consider F. C. 875.

The complaint charged that Honer, without the authority of the commission, had failed to operate from and after May 4, 1948; that from and after May 8, 1948, he had failed to have proper insurance on file with the commission and had willfully failed to comply with the said certificate and the orders, rules, and regulations of the commission; and that accordingly he had abandoned all operating rights under the certificate. The prayer was that the certificate be terminated, revoked, and canceled.

Honer answered the complaint denying that he had abandoned or intended to abandon the certificate, and denying that he willfully failed to comply with his certificate and the orders, rules, and regulations of the commission. The hearings of the examiner on this matter were held and concluded in April 1949.

The complaint is based on the provisions of section 75-238, R. R. S. 1943, which provides: "Permits and

certificates shall be effective from the dates specified therein, and shall remain in effect until terminated as herein provided. Any such permit or certificate may, upon application of the holder thereof, in the discretion of the State Railway Commission, be revoked or may, upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate."

The complaint is also based on the provisions of section 75-239, R. R. S. 1943, which provides in part: "No certificate or permit shall be issued to a motor carrier or remain in force unless such carrier complies with such reasonable rules and regulations as the State Railway Commission shall prescribe, governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in such reasonable amount as the commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles under such certificate or permit, or for loss or damage to property of others."

Honer's cab was operated as a unit of the Checker Cab Company fleet, hereinafter referred to as Checker, under an arrangement whereby he paid a fee to Checker for operating in its fleet and permitted the use of his cab by it "on the opposite shift." His cab carried the color scheme of Checker and a Checker number. Honer operated only the one cab.

There is no issue in this record as to Honer's operations prior to May 4, 1948. On that day he was involved

in an accident wherein his cab was damaged and he received personal injuries. Following the accident the cab was towed to the Checker lot and there remained except for a short time in December when it was repaired. Honer testified that he had the cab repaired so that he could sell it. He gave the keys to an official of Checker for that purpose. It was agreed its value was $1,000 or more. He agreed to sell the cab to Gillard in January 1949, for $1,000, and signed the papers at that time but did not receive the payment.

Honer was hospitalized for a period of time and up to the time of the hearing testified that he was not able to drive a cab and did not know when he would be able to do so.

The evidence is that Honer carried and paid for the collision, fire, theft, and tornado insurance on the cab. That insurance policy expired December 14, 1948. He did not renew it, testifying that he did not pay the renewal insurance because he was not operating and did not intend to operate the cab "as a cab."

The liability insurance on Honer's cab was carried by Checker and the premiums paid by it. On May 8, 1948, the insurance carrier filed with the commission notice that the Honer cab had been eliminated from coverage. It was not thereafter covered by liability insurance.

Honer testified that during the summer and fall he intended to go back to work but that thereafter he knew he would never be able to go back to work. He fixes the date of this at one place as in September, again on October 8, and again between October 1948, and January 1949. He further testified that he then intended that if he ever was able to drive a cab again, it would be as a driver on a commission basis, and that he knew or "felt" he would never be able to drive again and for that reason he undertook to transfer his certificate to Gillard.

R. C. plates for 1949 were not required at the time

of the agreement with Gillard. Honer testified that he did not apply for 1949 plates "because it was already assigned over before the time to get one."

Honer further testified that he had no intention of giving up or abandoning his right to operate up to the time he "transferred" to Gillard and that he had not abandoned up to that time.

The commission found that Honer "will be unable to resume taxicab operations."

There is evidence also that sometime during the winter of 1948-1949, Checker placed a cab in operation bearing the Honer number 19 and operated it under the Honer R. C. 1948 plates. These facts were discovered by a routine investigation by an employee of the commission. The inference of the evidence is that it was surreptitiously done by Checker. There is no showing that it was done with the knowledge, consent, or approval of Honer, nor is there any showing that it was done for his benefit or as an operation under his certificate, but rather was done as an operation of Checker under its certificate. The examiner stated in his report that under General Order 84 of the commission, Checker was required to furnish insurance coverage whether its " 'motor vehicles are specifically described in the policy or not,' " and that notice to the commission that certain cabs had been removed from coverage was unnecessary for the reason that Checker "has coverage for any and all vehicles operated." He also recited a provision that Checker's policy covered individual owners as additional assureds.

The examiner and the commission disposed of the insurance feature of this complaint by reasoning that Checker used Honer's R. C. plates and that passengers transported by the new cab using those plates had complete insurance coverage. In short, it was held that Checker's operation of its own cab under its insurance coverage, because of the use of Honer's R. C. plates, properly or otherwise, operated to furnish insurance

to Honer on his cab that was not in operation and had been withdrawn from insurance coverage. Obviously such a conclusion does not follow.

We have held that " 'Willful failure,' as used in section 75-238, R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform." Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N. W. 2d 363. See, also, In re Application of Resler, 154 Neb. 624, 48 N. W. 2d 718.

We have then a situation where an "owner-driver" cab was not operated at any time after May 4, 1948. So far as Honer was concerned, the service required of him by his certificate was not performed or tendered to the public. Honer was incapacitated and unable to drive, and made no effort to secure a driver of his cab, assuming that a driver other than Honer was proper. His cab was not in serviceable condition. It was not operated as a cab after May 4, 1948. Honer made no effort to repair it for several months and then repaired it to sell and not to operate. That liability insurance on his cab was required is not disputed. It was not furnished after May 8, 1948. The evidence leads to but one rational conclusion and that is to the fact that Honer had abandoned in fact and intent all operating rights under his certificate and that it was willful under the above definition. True, he testified at one place to a general intent otherwise, but that statement is not consistent with the circumstances and facts shown by the record and the finding of the commission. Rightly construed, it expressed his belief that he still had some right under his certificate that he thought he could transfer for a consideration. He intended only to sell.

The commission by its order dismissing F. C. 875

accordingly permitted Honer to hold a certificate of convenience and necessity for a service which he had not operated for some time, was not then operating, and which he did not thereafter intend to operate and which he was unable to operate. Under the circumstances shown here its order in that respect was unreasonable and arbitrary. See, Publix Cars, Inc., v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N. W. 234; Publix Cars, Inc., v. Yellow Cab & Baggage Co., 130 Neb. 413, 265 N. W. 240.

We go then to the issues presented by the appeal in B-595.

This is a joint application of Gillard and Honer for the transfer to Gillard of the certificate of Honer. Gillard makes the application as an individual proposing to operate under the trade name of Greyline Taxi. In his application he recites that he then operated motor vehicles under a commission certificate "as stockholder and President of Airline Ground Service."

The various objecting parties presented many issues as to the reasons why the application should not be granted. These we do not deem it necessary to determine here.

Hearings were held by an examiner on the application and concluded in April 1949. It is apparent that the examiner and the applicant proceeded on the theory that the commission had the power to transfer the certificate and that a showing of public convenience and necessity was not required.

On July 7, 1949, our opinion in the case of In re Application of Neylon, *supra*, was filed. On August 9, 1949, Gillard filed his application to reopen the proceedings to take further testimony on the issues of public convenience and necessity. The application to reopen was granted and an extended hearing held.

Gillard testified that it was his intention to operate one cab at the beginning but that if success crowned his venture, he would expand to a maximum of 10 or 15 cabs.

As to public convenience and necessity, the examiner found that "little, if any, proof was shown for additional city-wide service." The commission apparently accepted that finding for it turned for authority to grant the application to section 75-240, R. R. S. 1943. It should be noted that the amendment to that section, now 75-240, R. S. Supp., 1951, was not then effective and is not involved here.

Section 75-240, R. R. S. 1943, is in part: "It shall be lawful, under conditions specified below, but under no other conditions, for two or more motor carriers to consolidate or merge their properties, or any part thereof, into one ownership, management or operation of the properties theretofore in separate ownership, or for any such motor carrier, or two or more such motor carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier, or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person to acquire control of two or more motor carriers through ownership of their stock; or for any such person who has control of one or more motor carriers to acquire control of another such carrier through ownership of its stock."

Airline Ground Service, Inc., hereinafter called Airline, is a motor carrier holding a certificate of public convenience and necessity authorizing it to transfer passengers between the Municipal Airport and downtown Omaha. Gillard testified that he was president and general manager, and owned 51 shares of stock in this corporation. We do not find any testimony as to the number of shares of stock outstanding. However, in a "balance sheet" dealing with Airline, there is a recital that there were 91 shares of common stock. The commission found that Gillard owned 51 percent of the outstanding stock of the corporation. For the purposes of this opinion we assume that the record shows Gillard

owned a majority of the outstanding stock. On the basis of that stock ownership, the commission found that Gillard was a motor carrier as contemplated by the act. That finding is the basis for a principal contention of the appellants here. The commission thereupon entered an order approving the Gillard application in part, authorized him to conduct operations under the certificate issued to Honer, and assigned the operating rights and authority to Gillard to be conducted "under the name of Checker Cab Company." Among other things, Checker assigns that as error. We do not reach that question.

The initial and, as we view it, the controlling question here is whether or not Gillard is a "motor carrier" within the meaning of that provision in section 75-240, R. R. S. 1943.

In summary we have this situation. Airline is a motor common carrier holding a certificate of public convenience and necessity. Gillard is an individual holding a majority of the common stock of Airline. Although it does not appear to have entered into the consideration of the commission, Gillard is also shown to be president and general manager of Airline. As we view it, that fact makes no material difference.

We start with a rule that is elementary. "A corporation is a complete entity, separate and distinguishable from its stockholders and officers * * *." Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212.

Subdivision (8), section 75-223, R. R. S. 1943, defines a motor carrier, as used in the act, to mean "any person owning, controlling, managing, operating, or causing to be operated, any motor-propelled vehicle used in transporting passengers or property for hire over any public highway in this state." It was on the basis of this definition that the commission held Gillard to be a motor carrier.

Subdivision (1), section 75-223, R. R. S. 1943, states

that "person," as used in the act, "means any individual, * * * corporation * * *."

The term "motor carrier," as defined in the act, obviously was intended to be a term inclusive of both a common carrier and a contract carrier, also defined in the act. It is also patent that the term is intended to include those motor carriers which under the act have or are required to have either a certificate of public convenience and necessity as a common carrier or a permit as a contract carrier.

The definition does not refer to any person owning, controlling, managing, operating, or causing to be operated "a corporation" holding a certificate or permit, but, on the contrary, relates those terms to "any motor-propelled vehicle used." We think it obvious that whatever is done by Gillard with the vehicles of Airline under its certificate is done as an act of the corporation and not as an act of the individual as an officer or stockholder.

The last three clauses of section 75-240, R. R. S. 1943, quoted above, recognize a difference between the control of a motor carrier through stock ownership and the carrier itself. Subject to the powers given the commission, the first of the three clauses authorizes a motor carrier to acquire control of another such carrier through purchase of its stock. The last of the clauses authorizes a person who has control of one or more motor carriers to acquire control of another carrier through ownership of its stock. It appears that if the commission's construction of the definition clause is correct, then the last of the clauses in section 75-240, R. R. S. 1943, becomes largely redundant.

The rule is that in construing a statute, effect must be given, if possible, to every word, clause, and sentence, so that no part of its provisions will be inoperative, superfluous, void, or insignificant. Thomas v. Rasmussen, 106 Neb. 442, 184 N. W. 104.

The statutory definition of motor carrier by the very terms of the first clause of section 75-223, R. R. S. 1943, applies to all provisions of the act. It follows that if the commission's construction of the definition of motor carrier is correct, then, among others, the following statutory provisions would be applicable to every majority stockholder of a corporate motor carrier: The declaration of legislative policy contained in subdivision (3), section 75-222, R. R. S. 1943; the annual fee provision of section 75-226, R. R. S. 1943; the license plate provisions of section 75-227, R. R. S. 1943; and the insurance and classification provisions of section 75-239, R. R. S. 1943. A reading of the sections demonstrates that there was no such legislative intent. To construe those provisions as applying to such a stockholder would be absurd.

Assuming, but not holding, that there is ambiguity in the act or that it is susceptible to two constructions, the rule is: "When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness or unequal operation and the other of which avoids such a result, the latter should be adopted." Pierson v. Faulkner, 134 Neb. 865, 279 N. W. 813.

It necessarily follows that a majority stockholder of a corporate motor carrier is not a motor carrier within the definition of motor carrier in subdivision (8), section 75-223, R. R. S. 1943; and that section 75-240, R. R. S. 1943, does not authorize the commission to approve the application, and by the provision "but under no other conditions" denied the commission the power that it undertook to exercise. The commission was without authority to approve the application and erred in doing so. This decision makes it unnecessary to state or determine the other matters presented.

The order of the commission in F. C. 875 is reversed and the matter is remanded with directions to sustain the complaint. The order of the commission in B-595 is

reversed and the matter is remanded with directions to dismiss the application.

ORDERS APPEALED FROM REVERSED AND REMANDED WITH DIRECTIONS.

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CARTWRIGHT AND WILSON CONSTRUCTION COMPANY, A CO-PARTNERSHIP, APPELLEE, V. W. L. SMITH, APPELLANT.
52 N. W. 2d 274

Filed March 7, 1952. No. 33056.

1. **Juries.** The length of time devoted to meals while the jury is deliberating upon a verdict cannot be shown for the purpose of proving that they did not deliberate for the prescribed length of time provided by law.
2. **Pleading.** Where by statute, as in this state, plaintiff is authorized to plead general performance of all conditions precedent in a contract, defendant must, if he relies upon the fact that any of the conditions precedent have not been performed, set out specifically the condition and the breach.
3. **Trial.** The instructions to the jury in this case, when considered and construed together, fairly state the law applicable to the issues raised by the pleadings and proofs.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

*George B. Dent, Jr.*, for appellant.

*Baskins & Baskins* and *E. Leroy Shields*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

The plaintiffs, Leon Cartwright and William E. Wilson, a co-partnership engaged in the construction of outdoor drive-in theaters, brought this action at law in the district court for Lincoln County against W. L. Smith, defendant, to recover the balance due it as commission on a written cost-plus contract. The cause was tried to a jury resulting in a verdict in favor of the plaintiff in

the amount of $2,485.71, and a finding against the defendant on his cross-petition. Motion for judgment notwithstanding the verdict and in the alternative for a new trial was filed by the defendant. This motion was argued and overruled. Judgment was entered on the verdict. The defendant appeals.

For convenience we will refer to Cartwright and Wilson Construction Company, a co-partnership, as plaintiff and the partners thereof by their names as occasion requires. The outdoor drive-in theater will be referred to as the theater, and W. L. Smith as the defendant.

There is no dispute that a written contract was entered into by and between the plaintiff and defendant on August 18, 1948, by the terms of which the plaintiff agreed to construct the theater for the defendant. The defendant agreed to pay the costs of the labor and material used in the construction. By the terms of the agreement defendant agreed to pay the plaintiff ten percent of the cost of labor and material used in the construction.

The plaintiff's petition alleged that the theater was completed on or about September 10, 1948; that the plaintiff complied with all the terms of the contract; that the total cost of the labor and material used in the construction of the theater was $52,244.85; and that the defendant paid the plaintiff $2,500 and was given credit for $238.77 which should be deducted from the plaintiff's commission which totaled $5,224.48. The plaintiff prayed for $2,485.71, with interest and costs.

The defendant's amended answer specifically denied all of the allegations of the plaintiff's petition not admitted. It was alleged that plaintiff held itself out to defendant as being expert in the construction of outdoor drive-in theaters and, relying on its representation and promises, oral and written, the defendant entered into the contract refered to in plaintiff's petition; that notwithstanding such representations and warranties on the part of the plaintiff, the plaintiff wholly failed to construct the theater in a workmanlike manner; that it

furnished incompetent help and supervision; that by the failure to construct the theater in a workmanlike manner and carry out the terms of the contract the defendant was damaged; that defendant did not discover that the work was done in an unworkmanlike manner until after he had paid certain sums of money to the plaintiff; and that by virtue of the unworkmanlike manner in which plaintiff constructed the theater, the defendant was put to large expense, and, in order to make temporary repairs to the ground where the theater is located and keep it in operation he was obligated to expend $1,954.75. The items constituting this amount appear in the amended answer and will not be set forth here as they appear in the evidence. The defendant further alleged that the screen was constructed in an unworkmanlike manner and had to be remodeled and reinforced at a cost of $1,000; that the ticket office was located at a place which made it inaccessible and it was necessary to move it at a cost of $192; and that defendant, in order to properly have the ground drain to permit operation of the theater, would be obligated to expend $4,650. These items are also set forth in the amended answer. In addition, the defendant expended $268 for labor at plaintiff's request.

In his cross-petition the defendant incorporated the substance of the foregoing allegations of his amended answer, reiterated the same subject matter therein, and prayed for $8,064.75 and costs.

The plaintiff's reply to the amended answer was a general denial, and plaintiff's answer to the defendant's amended cross-petition was a general denial.

In addition to what has been heretofore set out in reference to the contract it provided, in substance, that plaintiff was to construct the theater upon property designated by the defendant. The theater was to accommodate approximately 500 automobiles. The construction was to be performed upon specifications furnished by the defendant, which would include construction of an

appropriate screen tower, a projection room, confectionary, and ticket office, construction of roads and ramps, all roads and ramps to be graded and packed, plaintiff to do all painting and electrical work, to install adequate water and sewerage system consisting of a septic tank and cesspool, and plumbing facilities required by defendant. Plaintiff was to furnish a competent civil engineer to supervise the laying out of the roads, the grading, and other installations. The engineer was to be paid $150 a week. Services of the engineer were to be computed in the cost of the construction for the purpose of determining the ten percent commission. Defendant was to pay all bills for material and labor necessary in the construction of the theater. The cost of installation of sound and projection equipment and field speakers was to be included in determining the ten percent commission.

It appears from the record that Leon Cartwright and William E. Wilson were a co-partnership engaged in the business of constructing outdoor drive-in theaters since 1946. Leon Cartwright testified that he became acquainted with the defendant, W. L. Smith, who was desirous of having an outdoor drive-in theater constructed in North Platte. Prior to the time he became acquainted with the defendant his firm had constructed 10 or 12 such theaters. The defendant came to Greeley, Colorado, where his firm was constructing a theater. He and the defendant talked about the construction of a theater. As a result a contract was entered into. Leon Cartwright looked over the site which defendant had purchased. The other member of the firm, William E. Wilson, went to North Platte on August 19, 1948, to supervise the construction of the theater, and took some workmen with him, two of whom were Mr. Haynes and an elder Mr. Cartwright. The construction of the theater was practically finished and completed about September 10, 1948, and it was in operation by September 18, 1948. Wilson next saw the defendant in the early part of 1949.

On this occasion he and the defendant went over the bills evidencing the cost of the construction of the theater and certain payments made by the defendant. The items used in the construction and the total cost thereof were detailed by Wilson, the amount of the plaintiff's commission determined, and the payments made by the defendant.

At this point the plaintiff rested its case. The defendant moved for a directed verdict which was overruled, and will be discussed later in the opinion under one of the defendant's assignments of error.

The defendant then adduced evidence of a civil engineer familiar with the theater, who made a survey of the premises on November 17, 1950, in which he mapped the layout, the position of the screen, the ramps and the roads, and took levels to ascertain the slope of the land in order to perfect drainage to keep the theater in operation during the spring season. He detailed in what manner this work should be done, and concluded it would take 3,400 cubic yards of clay to fill the ramps and 1,000 cubic yards of gravel would be necessary to finish off the slope. He was unacquainted with the top soil or the condition of the land prior to the time he made this survey and estimate. The cost of the material and expense involved were testified to by the defendant.

A general contractor, familiar with the theater and the premises, was called out on the ground in June 1949. By an exhibit he identified the screen, testified to its condition, and that he placed it back in the condition in which it was before it was blown over by the wind. In January 1950, he was called again to put the screen in a workable and stationary condition. He explained how he reinforced it to make it substantial for the purpose for which it is used. He testified to the material used, the cost thereof, and gave an estimate of the cost of the labor necessary for the job. He further testified that the screen was not properly constructed. He had

not engaged in the construction of theater screens. It appears that this screen was blown down by the wind on two occasions, and the defendant was reimbursed by an insurance carrier to place the screen back in condition.

The defendant testified that he had operated the theater since it was completed, a period of 59 days in the fall season of 1948. He got the idea of constructing such a theater in the summer of 1948. He looked around at different theaters, looked for a location at North Platte, contacted Leon Cartwright, and later purchased a site in North Platte. Leon Cartwright came to North Platte and they looked over the 12 acres of ground which the defendant had purchased, walking across the entire area. There was one small place where the screen now sits where there was an indication of very little top soil remaining, which does not affect the theater site. They then proceeded to Denver to purchase equipment for the tower, which Leon Cartwright agreed to help him purchase. Subsequently, at Greeley, they entered into the contract. He noticed that part of the contract stated that he should furnish the plans and specifications. He told Leon Cartwright that he knew nothing about that kind of construction and had no plans. He was informed that that would make no difference. He took no part in the construction of the theater. Mr. Haynes came to lay out the ground for the theater. He surveyed the land and set the stakes for grading and for construction of the ramps. Haynes stayed in North Platte approximately two weeks, then informed the defendant that Leon Cartwright was going to send another engineer. The defendant indicated he was not satisfied, but Haynes left, as he was needed on another project. The man to replace him, Cecil Porter, came immediately and started the work where Haynes had left off. He stayed four days after the workmen left. Porter supervised the leveling and grading. The theater opened on September 18, 1948. Porter was there four days after the

opening. There were some finishing touches to be done on the ramps, and Porter was to supervise the spreading of the gravel.

After the theater opened it rained some ten days to two weeks. The ramps did not drain off. Water settled in puddles creating soft spots in the area, and automobiles would get stuck in them. The defendant contacted the plaintiff. He informed plaintiff about water standing in puddles around the ramps. Leon Cartwright called him and said he was so busy he could not make it, but he would send Haynes and a couple of workmen. Haynes and two workmen did come, but several weeks had elapsed and it was about the middle of December. The ground was frozen and they were unable to do any work at that time. The defendant paid $75 to Haynes, $45 to one of the workmen, and $48 to the other workman. In February 1949, Leon Cartwright came from Denver to inspect the theater. They walked over the premises and conferred about the drainage. Leon Cartwright said he would come in June and reconstruct the ramps. Defendant said that would be too late, as he wanted to open the theater and could not operate in a mudhole. Leon Cartwright told him to get the land surveyed, get the dirt haulers, and prepare the theater to open, and it would be deducted from what he owed the plaintiff. Pursuant to that instruction the defendant hired an engineer, the county surveyor, and paid him $58.45 to survey the ground. The defendant negotiated with a sand and gravel company for the use of heavy machinery and the work connected with it, and for hand labor. The amounts paid for this work appear in the record. He further testified that he had never been reimbursed for any of the work that had to be done. In the spring of 1949, Wilson came to see the defendant. They discussed the drainage and defendant informed Wilson it was not complete, that it was temporarily taken care of, and Wilson agreed to talk to Leon Cartwright about it. It rained that spring, cre-

ating puddles of water on the theater site and made it difficult to do the temporary work, and then in June the defendant had trouble with the screen.

The defendant detailed the work necessary to perfect the drainage for the operation of the theater; work done by himself and his son to improve the drainage; the amounts he paid, necessary to temporarily fix the theater site for operation of the theater; the items as set forth in the contract; the amount of the construction of the theater; the commission payable to the plaintiff; and payments made to plaintiff by him.

One witness who lived in close proximity to the theater and sold the land to the defendant testified with reference to the top soil on this 12 acres, the manner in which the ramps were constructed, the leveling of the dirt, what had to be done to place the theater so that it could be operated, and detailed the drainage and expense incident to it. There was also evidence to the same effect by other witnesses who were either on the ground or worked there, and evidence of defendant's wife to the effect that Leon Cartwright told her husband to go ahead and get the ramps fixed up and the drainage corrected.

Leon Cartwright was recalled and testified that the theater was to be constructed similar to the one in Greeley, Colorado. In December 1948, this witness had learned while in Denver that the defendant was not satisfied with plaintiff's work, so he went to North Platte. He contacted the defendant and they looked over the theater property. Defendant told him that he was not satisfied with the ramps. The ground was frozen and no work of any consequence could be done at that time. Leon Cartwright told the defendant he would have Haynes come down. Haynes did come. He looked over the theater property with the defendant who complained because the ramps were not draining the water properly. Haynes checked the grade stakes and there was not over three inches variation from the

grade as fixed originally. There were some chuckholes which caused a "washboard" condition and created a maintenance job. The defendant was so informed.

When Haynes first arrived on the job on August 19, 1948, he went over the ground with the defendant and told the defendant he was not satisfied with the type of soil. The top of the soil was scraped off and there was nothing left but beach sand which is not suitable to build on for theater purposes. He suggested that the defendant acquire other property and he would be glad to assist him. The defendant replied that he had this property. It was apparent that he wanted the theater built on it and to get it done as cheaply as possible. There was also a conversation between Haynes and the defendant about the tower to the effect that Haynes did not believe the ground would hold the tower up. The defendant replied that he had spent the money and was going to build a drive-in theater, and to continue with the construction. When Haynes left the majority of the fill had been completed and the entrance road, the exit road, and the ramps had been completed. The spread for the gravel was also fixed before he left. There was no occasion for him to remain. He was followed by Porter who was more or less a grading foreman and able to operate the machinery incident to that kind of work when occasion required. Also, when Haynes left the theater was 85 or 90 percent completed, just the distribution of the gravel remained to be done.

C. H. Cartwright, an uncle of Leon Cartwright, worked on the project. He arrived in North Platte on August 19, 1948, and was foreman of the screen tower. He had constructed screen towers previously, and had a regular pattern for such construction. He testified to the conversation had between Haynes and the defendant with reference to the suitability of the ground for theater purposes. He was also present with Leon Cartwright and Mr. Knox on December 11, 1948, when they, together with the defendant, went to the theater site. The screen

at that time was in good condition. The tower was "setting good and tight." There was no complaint by the defendant with reference to the top of the ramps. There were some chuckholes where car wheels had sunk into the ground. He had not seen the screen when it was damaged by wind. He noticed that it had been reinforced.

William E. Wilson testified that he arrived in North Platte on August 19, 1948, and superintended the project which included constructing the tower and grading and leveling the land. He testified to the conversation had between the defendant and Haynes with reference to the suitability of the land for theater purposes; and that Haynes seemed to believe it would be quite impossible to build ramps with nothing but sand as a base and to haul dirt to mix with the sand would create a great deal of expense. Defendant, on the other hand, believed that the expense would be less, as he owned the land and to buy another site would incur more expense. Wilson had something to do with the moving of the ticket office, and explained why the defendant wanted it moved. The ticket office was not completed, and the moving was about a two-hour job. The tower was substantially like the one built in Greeley. He attended the opening of the theater and remained three or four days thereafter. He was also in North Platte in the spring of 1949 and interviewed the defendant. They went over the worksheets, the bills, and the payrolls to arrive at the cost of the materials. He made a demand on the defendant to pay the balance due the plaintiff, which defendant refused to pay.

The defendant assigns as error that the verdict of the jury is invalid for the reason it was concurred in by only ten members and was returned into court before the jury had an opportunity to deliberate and consider the case for a period of at least six hours, as required by law.

The record discloses that the case was submitted to the

jury at 4:30 p. m., on March 14, 1951. The jury then deliberated until 6 p. m., when it was taken to dinner at a local cafe by the bailiff. Approximately one hour elapsed from the time the jury left the jury room until it returned to the jury room after dinner. The jury advised the bailiff it was ready to return a verdict at 10:45 p. m., at which time the court and counsel for the respective parties were notified. At the instruction of the court the jury was brought into open court and delivered its verdict at 10:50 p. m.

Article I, section 6, of the state Constitution provides the Legislature may, by general law, authorize a verdict in civil cases in any court by not less than five-sixths of the jury. In accordance with the constitutional authorization the Legislature enacted a law which is now section 25-1125, R. R. S. 1943, providing in substance that where five-sixths of the members of a jury concur in a verdict it will have the same validity as if all members of the jury concurred therein; and that a verdict concurred in by less than all the members of the jury shall not be rendered until the jury shall have an opportunity for deliberation and consideration of the case for a period of not less than six hours after the same is submitted to said jury.

The defendant contends it appears that the jury in the instant case actually deliberated for a period of five hours and twenty minutes, and no more, therefore, the verdict returned by the jury was in violation of the statutory provision cited.

This court has not had occasion to pass directly upon this proposition. We believe the case of Hurlburt v. Leachman, 126 Minn. 180, 148 N. W. 51, is applicable and decisive on this point. The appellant contended the jurors had been removed from the jury room for the purpose of obtaining their meals and also for the purpose of sleeping, and that considering such facts, the jury did not have an opportunity to deliberate on the case the full 12 hours as required by law. The court

reasoned that during retirement the jurors are presumed to be properly performing their duties. Their deliberations are not necessarily confined to discussion or debate with each other. While such are essential to a proper consideration of matters concerning which there is a difference of opinion, a juror may deliberate as wisely and to as good effect when he is considering and weighing the evidence in his own mind as when he is pressing his conclusions upon his fellows. The court assumes that the jurors are deliberating while in retirement for the purpose of determining and arriving at their verdict, and will make no inquiry into the nature or extent of such deliberation. The court held that the length of time devoted to meals and sleep while the jurors are deliberating upon their verdict cannot be shown for the purpose of proving that they did not deliberate for the prescribed length of time.

We conclude that the defendant's assignment of error is without merit.

The defendant contends that the plaintiff failed to sustain the burden of proof for the reason that the defendant's answer denied generally the allegations of plaintiff's petition and, in addition, specifically pleaded certain facts to show wherein the plaintiff breached the contract. The duty then devolved upon the plaintiff to establish by competent evidence substantial performance of the contract, which it failed to do. In proving substantial performance of the contract it was incumbent upon the plaintiff to prove all of the items contained therein which constituted conditions precedent. The proof adduced by the plaintiff before the defendant made his motion for directed verdict was as follows: The plaintiff proved the execution of the contract; that pursuant to the contract the theater was constructed as provided for therein and the contract completed; that the cost of constructing the theater was $52,244.85; that there was due plaintiff $2,485.71 on the contract; and that defendant accepted the theater and proceeded to operate it.

Section 25-836, R. R. S. 1943, provides: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance."

If the defendant relies upon nonperformance of the contract by the plaintiff, he must allege that fact in his answer, and in pleading nonperformance, the facts which constitute the breach must be alleged. Where by statute, as in this state, the plaintiff is authorized to plead general performance of all conditions precedent, the defendant must, if he relies upon the fact that any of the conditions precedent have not been performed, set out specifically the condition and breach. See, Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793; Morearty v. City of McCook, 119 Neb. 202, 228 N. W. 367; Davidson v. First American Ins. Co., 129 Neb. 184, 261 N. W. 144; § 25-836, R. R. S. 1943.

As stated in Morearty v. City of McCook, *supra*: " 'In pleading such nonperformance, the facts which constitute the breach must be alleged, and the breach assigned must conform to the terms of the contract. * * * Where by statute plaintiff is authorized to plead a general performance of all conditions precedent, defendant must, if he relies on the fact that any of the conditions precedent have not been performed, set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed.' "

Under the cited authorities, a general denial raises no issue as to any of the conditions precedent, and the plaintiff is not required to make affirmative proof on these issues.

Without restating the allegations of the defendant's answer in addition to the general denial contained therein but making reference to it, it is apparent that nonperformance is not pleaded, as required by the cited authori-

ties. In this state of the record it was not incumbent upon the plaintiff to prove all of the separate items constituting conditions precedent to the contract, as contended for by the defendant.

It appears to be the rule where a contract has been substantially performed, as the evidence discloses in this case and the theater accepted, the measure of damages to the accepter would be the cost of remedying the defects. Morearty v. City of McCook, *supra*, wherein it is said: "And we remain satisfied with the further instruction to the district court in connection therewith that the measure of damages would be 'the cost of remedying the defects.'" See, also, Morearty v. City of McCook, 117 Neb. 113, 219 N. W. 839; Library Board v. Ohlsen, 110 Neb. 146, 193 N. W. 110.

In the light of the foregoing authorities, we conclude the trial court did not err in overruling the defendant's motion for a directed verdict.

The defendant requested an instruction to the effect that under the law of this state an engineer, before practicing his profession, must meet certain qualifications and be licensed to practice in this state, and that the fact that the engineer furnished by the plaintiff was not a licensed civil engineer in this state may be taken into consideration in determining whether or not the plaintiff breached the contract and performed the engineering work in a negligent and incompetent manner. The contract provided that the plaintiff was to furnish a competent engineer. The defendant did not specifically plead in his amended answer and cross-petition the failure of the plaintiff to furnish a competent licensed engineer as a condition and breach of the contract. As heretofore pointed out, no breach of the contract became an issue in this case. The evidence shows that the plaintiff substantially performed the contract. The defendant accepted the theater and began to operate it. Whether or not the engineering work was done in an unworkmanlike and negligent manner, as pleaded in the defendant's

amended answer and cross-petition, became a question for the jury to determine under the instruction on the measure of damages as it applies to the defendant. We conclude the trial court did not err in refusing the requested instruction.

The defendant requested an instruction to the effect that plaintiff held itself out as expert in the construction of outdoor drive-in theaters, and it was for the jury to consider whether or not the plaintiff performed its services in a workmanlike manner and as an expert in that field. The defendant pleaded such facts in his amended answer and cross-petition. From an analysis of the evidence, the defendant complained of the construction of the screen and the drainage on the theater site. In any event, evidence was before the jury for its determination as to whether or not the plaintiff performed its services in a workmanlike manner. The items constituting what the jury might take into consideration in such respect appear in another instruction which will be referred to later on. We find no error in the court's refusal to give the requested instruction.

The defendant requested an instruction which comprised certain items of expense to which he was put to place the theater in temporary operation, and also an amount of $100 which was paid to an employee of the plaintiff, for which it was acknowledged he should receive credit. The items constituting the basis of this instruction were before the jury and are related in defendant's amended answer and reiterated in his cross-petition, and the jury had the full benefit of this evidence to determine whether the amount should be credited to the defendant in the event he should recover. We believe, under the circumstances, the trial court did not err in refusing the requested instruction.

The defendant requested an instruction to the effect that evidence had been introduced with reference to the screen not being properly constructed and it was necessary for him to expend money to reinforce the

screen, and the jury, if they found the screen not to be properly constructed could determine from the evidence the fair and reasonable costs of properly reinforcing the screen, and give the defendant credit for such sum. The screen was constructed on a standard pattern as screens of that type. The evidence shows that on two occasions it had been damaged by the wind and reconstructed. In any event, the evidence was before the jury for its consideration, to determine whether or not the defendant should receive credit for the sum so expended. Specifically, in another instruction the court set out the items that the jury might take into consideration in determining if the defendant should recover. The screen was included therein. We find no error in the court's refusal of the tendered instruction.

The defendant predicates error on the giving by the trial court of instruction No. 2. This instruction set out the burden of proof required of the plaintiff before plaintiff would be entitled to recover. The defendant's main contention is with reference to exhibit A attached to the plaintiff's petition, which is a copy of the contract, and exhibit No. 1 introduced in evidence, which is the contract, and to which no objection was made. Defendant contends that there is no showing that exhibit A and exhibit No. 1 are the same instrument, that is, the contract. We find no merit to this part of defendant's contention. The contract is in evidence. No objection was made to its introduction. It was accepted as the only contract between the parties. With reference to the burden of proof on the plaintiff as appears in this instruction, it is the only instruction the court could properly give on the subject on the issues joined herein. The defendant's assignment of error cannot be sustained.

The instruction on the measure of damages given by the trial court was whatever amount of damage the defendant had established by a preponderance of the evi-

dence, after deducting whatever amount is due the plaintiff under its contract, if any. The instruction said: "In considering the amount of damages, you must take into consideration any improper construction in the building of the screen tower, if any, projection room, confectionary and ticket office, roads, ramps, grading and drainage, and other evidence introduced in this case relative to said matters." There is no objection made by the defendant as to the measure of damages, and on the issues as joined the measure of damages was properly instructed upon.

Defendant predicates error on the giving by the trial court of instruction No. 6, which is the instruction on the burden of proof required of the plaintiff before the plaintiff may recover. This instruction is proper in form and in compliance with the burden of proof required of plaintiff in this case on the issues joined.

The defendant predicates error on the giving by the trial court of instructions Nos. 10 and 11. Instruction No. 10 referred to what the jury might consider in determining whether or not the plaintiff should recover, and No. 11 was an instruction on the burden of proof required of the defendant on his affirmative defense based upon his cross-petition, and included what the jury might take into consideration in determining if the defendant be entitled to recover. This consisted of the building of the screen tower, the projection room, confectionary, ticket office, roads, ramps, grading and drainage, and other evidence introduced in this case relative to such matters. In instruction No. 10, the word "preponderance" does not appear before the word "evidence," while in instruction No. 11, the word "preponderance" does appear before the word "evidence." Therefore, the defendant contends that a greater burden is placed upon the defendant in proving his affirmative defense, as pleaded in his cross-petition, than upon the plaintiff. We have heretofore stated that the trial court, in a previous instruction, set forth the burden of proof

required of the plaintiff before it could recover, and made reference that the plaintiff must so prove by a preponderance of the evidence. There is no merit to the defendant's assignment of error.

The instructions to the jury in this case, when considered and construed together, fairly state the law applicable to the issues raised by the pleadings and proofs. See, O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123; Barton v. McKay, 36 Neb. 632, 54 N. W. 968.

Other assignments of error need not be discussed.

We conclude that the verdict of the jury and the judgment entered thereon by the trial court is correct and should be, and is hereby, affirmed.

AFFIRMED.

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RALPH STRAUEL ET AL., APPELLANTS, V. BERNIE PETERSON, DOING BUSINESS AS OGALLALA LIVESTOCK COMMISSION COMPANY, APPELLEE.

52 N. W. 2d 307

Filed March 7, 1952. No. 33067.

1. **Actions: Animals.** No right of action for damages accrues to an individual injured by a violation of sections 54-766, R. S. Supp., 1949, and 54-1123, R. S. 1943.
2. **Statutes.** Statutes are not to be understood as effecting any change in the common law beyond that which is clearly indicated.

APPEAL from the district court for Keith County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

*Torgeson, Halcomb & O'Brien,* for appellants.

*George B. Hastings,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This action was brought by the plaintiffs to recover

damages claimed to have resulted from the purchase of cattle infected with Bang's disease. Issues were made and trial was had resulting in a judgment for defendant. Plaintiffs appeal, assigning error in giving and failing to give instructions and in the admission of evidence. Defendant contends that plaintiffs have neither pleaded nor proved a cause of action and have no right of recovery, and that in any event the record is free of prejudicial error. We sustain the first of the above contentions and affirm the judgment of the trial court dismissing the action.

A demurrer by the defendant does not appear in the transcript. In his answer defendant alleged that the petition did not state facts sufficient to constitute a cause of action. The bill of exceptions shows that at the beginning of the trial this question was presented and the trial court overruled the demurrer. The parties have considered it as sufficient to raise the issue of the right of plaintiffs to recover damages based on an alleged violation of the statute and hence we determine it.

Plaintiffs alleged that defendant is an individual engaged in the operation of a livestock sales ring in Keith County under license from the Department of Agriculture and Inspection; that on February 1, 1950, defendant caused and completed the sale to plaintiffs of 26 Black Angus breeding cattle; that defendant represented that said cattle were brought into Nebraska from Colorado and such was the fact; that the cattle were not accompanied by the required Bang's disease certificate or official health certificate and did not enter under quarantine regulations, nor was there a health certificate of proof of vaccination on file with the department; that the cattle were released from the defendant's sales ring for intrastate shipment before the requirements of the state were complied with; that the cattle were infected with Bang's disease at the time of sale and plaintiffs did not know it; that plaintiffs had been advised before

purchase that the cattle had been imported from Colorado but that they did not know the law with reference to Bang's disease had not been complied with; and that plaintiffs offered to return the cattle and defendant refused to accept them.

Plaintiffs next alleged that the 26 cattle were placed with cattle in their herds. Plaintiffs alleged expenses involved in caring for the cattle and depreciation in their value. Plaintiffs further alleged that if the requirements of the statutes had been complied with, the diseased condition of the cattle would have been known and the cattle could not have been offered for sale as breeding cattle.

Plaintiffs then alleged that they had been damaged (1) as a proximate result of the entry of the cattle into the state without compliance with the law, (2) because the law was not complied with prior to the removal of the cattle from the sales ring, and (3) because the cattle were released from the sales ring for intrastate shipment without compliance with the law. Plaintiffs prayed for damages.

Plaintiffs state here that their case is based on a violation of the statutes and not upon a breach of warranty or fraud, and that, proving a violation of the statutes, the only issue for the jury was one of damages.

Plaintiffs particularly rely upon the alleged violation of sections 54-766, R. S. Supp., 1949, and 54-1123, R. S. 1943.

Section 54-766, R. S. Supp., 1949, provides in substance that dairy and breeding cattle entering the state from a foreign state or country must have come directly from Bang's disease certified herds, or have been tested for Bang's disease with negative results within 30 days prior to shipment into the state and be accompanied by a certificate, or such cattle may enter the state under quartine regulations and be tested within 30 days, or be accompanied by an official health certificate showing vaccination.

Section 54-1123, R. S. 1943, deals with the release of animals from a livestock sales ring after inspection, removal, or quarantine, and "No such livestock for interstate or intrastate shipment shall be released until all the requirements of the state of its destination shall have been complied with."

Plaintiffs rely on the rule stated in Johnson v. Weborg, 142 Neb. 516, 7 N. W. 2d 65, that "* * * a failure to perform a mandatory duty enjoined by statute is negligence per se, and if any person to whom the duty is owed, or for whose protection the statute is enacted, is injured in consequence of such violation a case is made."

Defendant relies on Frontier Steam Laundry Co. v. Connolly, 72 Neb. 767, 101 N. W. 995, 68 L. R. A. 425, wherein we said: "Wherever a statute or ordinance creates a duty or obligation, though it does not in express terms give a remedy, the remedy which is properly applicable to that obligation follows as an incident, but whether a liability arising from the breach of a duty prescribed by a statute or ordinance accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined and the benefits to be derived from its performance. * * * If the duty imposed by the ordinance is clearly intended for the protection and for the benefit of individuals or of their property, the violation of the rule prescribed tends to show negligence for which a recovery may be had; but where the duty is plainly for the benefit of the public at large, then the individual acquires no new rights by virtue of its enactment, and a violation of the rule is of no evidential value upon the question of negligence. It is not always easy to draw the line between the two classes of enactments. In fact, in some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty en-

joined as evidence of negligence. The rule which is applicable can only be ascertained from a consideration of the object and purpose of the enactment itself in each particular case." See, also, Hanley v. Fireproof Building Co., 107 Neb. 544, 186 N. W. 534, 24 A. L. R. 382; 65 C. J. S., Negligence, § 19, p. 425; 38 Am. Jur., Negligence, § 164, p. 834; 50 Am. Jur., Statutes, § 585, p. 580.

The Bang's Disease Act was first passed by the Legislature in 1939. Laws 1939, c. 68, p. 278. It was amended in 1941 (Laws 1941, c. 114, p. 444); in 1945 (Laws 1945, c. 131, p. 414); and in 1949 (Laws 1949, c. 172, p. 452). The provisions of the act, sections 54-764, 54-764.01, and 54-766, R. S. Supp., 1949, and 54-765, R. S. 1943, must be construed together. We find nothing in the original act or in any of the amending acts which shows a legislative intent to create a civil liability for a violation of the act upon which a right of action for damages to an individual can be based. The act is clearly a health regulation recognizing the economic dangers to the cattle industry from the presence of Bang's disease in the herds of this state and the health dangers to the people of this state from diseases having their source in Bang's disease infected cattle. The act undertakes to secure three results: (1) The eradication of the disease from the herds of this state; (2) compensation in some measure to the owners of condemned diseased animals; and (3) the prevention of dairy and breeding animals afflicted with the disease entering the state. The 1945 Legislature (section 54-764.01, R. S. Supp., 1949) stated the purpose, in part at least, as "For the protection and promotion of the cattle industry in Nebraska" and "the control and eradication of Bang's disease." It undertakes to accomplish these purposes, referred to in the section last above cited as a "program," through the orderly processes of administration of the act by the Department of Agriculture and Inspection.

We find in the act no such provision as was before the court in Schrank v. Philibeck, 251 Wis. 546, 30 N. W.

2d 233, where the statute provided that any person, corporation, or common carrier shall be liable for all damages caused to any livestock for evasion or failure to comply with the requirements of the act. Nor is there in the act such a provision as was before the court in Martin v. Sheely, 144 F. 2d 754, where the statute made it illegal to own, have in possession, sell, transfer, transport, drive, or convey livestock infected with Bang's disease from one section of the Territory of Alaska to another. We do not find in our act any provisions of a similar nature. It is recognized that it is not necessary to the maintenance of an action that the statute so expressly provide. Strahl v. Miller, 97 Neb. 820, 151 N. W. 952, Ann. Cas. 1917A 141. We find nothing in the act upon which a finding of such a legislative intent can be based.

The rule is: " 'Statutes are not to be understood as affecting any change in the common law beyond that which is clearly indicated.' " Nielsen v. Chicago, B. & Q. R. R. Co., 141 Neb. 584, 4 N. W. 2d 569. See Zimmerer v. Prudential Ins. Co., 150 Neb. 351, 34 N. W. 2d 750. Such statutes are to be strictly construed in favor of persons sought to be subjected to their operation. See, also, 59 C. J., Statutes, § 668, p. 1129; 50 Am. Jur., Statutes, § 402, p. 425; Campbell v. Youngson, 80 Neb. 322, 114 N. W. 415; Bank of Commerce & Savings v. Randell, 107 Neb. 332, 186 N. W. 70, 21 A. L. R. 1360; Leon v. Kitchen Bros. Hotel Co., 134 Neb. 137, 277 N. W. 823, 115 A. L. R. 1078.

It necessarily follows that under the statutes involved no right of action accrues to an individual injured by a violation of the act.

Accordingly we affirm the judgment of the trial court dismissing the action.

AFFIRMED.

WENKE, J., dissenting.

I dissent from the rule announced by the majority opinion as applicable to the statutes involved. The

rule which is applicable in each case must be ascertained from a consideration of the objects and purposes of the statute or statutes being considered but when a statute creates a duty, though it does not in express terms give a remedy, the remedy which is properly applicable to that obligation follows as an incident thereto.

To me the nature of the duties here imposed and the benefits to be derived from their performance applies to the herds of individual owners of cattle as well as to the entire cattle industry and the public at large. As stated in Frontier Steam Laundry Co. v. Connolly, 72 Neb. 767, 101 N. W. 995, 68 L. R. A. 425, cited in the majority opinion: "* * * in some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty enjoined as evidence of negligence." For a more extended discussion see Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680.

YEAGER and CHAPPELL, JJ., join in this dissent.

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MARY W. PAVLICEK, ADMINISTRATRIX OF THE ESTATE OF JOHN L. PAVLICEK, DECEASED, APPELLEE, V. STANLEY J. CACAK, APPELLANT, JAMES E. HOLMES, APPELLEE.
52 N. W. 2d 310

Filed March 7, 1952. No. 33090.

1. **Trial.** If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict.
2. ———. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be re-

solved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.

3. Negligence: Automobiles. Gross negligence, within the meaning of section 39-740, R. S. 1943, means negligence in a very high degree, or the absence of even slight care in the performance of a duty.

4. ———: ———. In an action for gross negligence under the automobile guest statute (section 39-740, R. S. 1943), where there is proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.

5. Negligence. The question of the existence of gross negligence must be determined from the facts and circumstances in each case.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and ordered dismissed as to appellant.*

*Neighbors & Danielson,* for appellant.

*Hans J. Holtorf, Kirkpatrick & Dougherty,* and *Atkins, Lyman & Ferguson,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Mary W. Pavlicek, as administratrix of the estate of John L. Pavlicek, deceased, brought this action in the district court for Scotts Bluff County against Stanley J. Cacak and James E. Holmes. The purpose of the action is to recover damages arising from the wrongful death of John L. Pavlicek. The basis for the recovery is that John L. Pavlicek's death was caused by an automobile collision between defendants' cars which collision plaintiff alleges was caused by the concurrent negligent conduct of both. Plaintiff recovered a verdict for $10,353.10 against both defendants. Thereafter defendant Cacak filed a motion for judgment notwithstanding

the verdict or for a new trial. This alternative motion was overruled and judgment was entered on the verdict. Thereupon defendant Cacak appealed.

John L. Pavlicek was at the time of the accident riding as a guest in the car of appellant. In view thereof the burden was on appellee, in order to recover, to establish, by a preponderance of the evidence, that appellant was guilty of gross negligence in the driving of his car. It was not enough for her to establish that appellant, in operating his car, may have been guilty of ordinary negligence. Appellant's liability was submitted to the jury on the basis of whether or not he was guilty of gross negligence. The only question appellant raises by his appeal is, does the evidence adduced at the trial establish a factual situation which will sustain the jury's finding that he was guilty of gross negligence?

It should here be stated that appellant made proper motions for a directed verdict at the close of appellee's evidence and again at the close of all the evidence, which motions the trial court overruled.

The principles here applicable have been stated by this court as follows:

"If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict." Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

"In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Smith v. Platte Valley Public Power and Irrigation Dist., 151 Neb. 49, 36 N. W. 2d 478.

"Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1941 (now section 39-740, R. S. 1943), means negligence in a very high degree, or the absence of even slight care in the performance of a duty." Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041.

"In an action for gross negligence under the automobile guest statute (Comp. St. Supp. 1939, sec. 39-1129), where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence." Thompson v. Edler, 138 Neb. 179, 292 N. W. 236.

"The question of the existence of gross negligence must be determined from the facts and circumstances in each case." Landrum v. Roddy, *supra.*

The accident, as a result of which Pavlicek died on July 23, 1950, happened shortly after 4:25 a. m., on July 19, 1950, at an intersection located three miles north of Minatare, Nebraska. Decedent and his family, consisting of his wife, a son, and a daughter, lived at Fairbury, Nebraska. He and his family had come to Alliance, Nebraska, where appellant lived, on July 18, 1950, to visit appellant, decedent's nephew. That evening decedent and appellant made plans to go fishing the next day in Lake Minatare which is located a few miles north of Minatare. They left Alliance for that purpose the next morning just at daybreak, which was shortly after 3 a. m. They drove to Minatare, some 45 miles distance, and then turned north from Minatare to go to the lake. Appellant was driving his car, a 1937 Pontiac coach, and decedent was riding as his guest. The road they were traveling on north of Minatare was a maintained dirt-gravel road, the improved part of which was about 26 feet in width. The east-

west road at the intersection was of about the same character only the improved part was about 23½ feet in width. There were no stop signs at the intersection. It was daylight at the time of the accident, the weather was clear, and the road surface was dry and fairly smooth. Appellant had only been over this road once before. That was in April 1950 when he was a guest in the car of another.

There is very little dispute in regard to the principal facts herein involved. In its most favorable light for appellee, the evidence can be said to establish: That appellant was driving north on this highway at 50 miles an hour; that his brakes and tires were in good condition; that north of Minatare there had been no traffic on the road; that decedent made no protest as to appellant's driving; that as appellant approached the place of the accident he realized he was coming to an intersection; that somewhere between 300 and 500 feet south thereof he attempted to look to the east to see if any cars were approaching but saw no cars and realized his view in that direction was obstructed by trees and farm buildings located there; that he observed the slow sign located some 225 feet south of the intersection on the right-hand side of the highway but did not slow up; that he did not again look to the east until he was 40 feet south of the intersection where he could see past the trees to the east, which trees came right up to the fence corner; that he then observed a car approaching the intersection from the east at about the same distance therefrom that he was to the south; that he was traveling on the right side of the traveled portion of the road but near the center thereof; that he was unable to apply his brakes after he saw the car; that he attempted to turn to the left; that he entered the intersection at about 50 miles an hour; that the two cars met in the intersection; that the car coming from the east was a 1942 Ford coach owned by defendant James E. Holmes, who was driving it; that the front of appellant's car,

toward the right side thereof, struck the left side of Holmes' car near the front; that both cars turned over and lay on their right sides on the west side of the north-south road; that appellant's car was in the northwest part of the intersection; that the Holmes car lay some 25 to 30 feet north thereof; that both cars were facing mostly to the south but slightly east; and that the appellant's car lay across the lower part of decedent's body.

From these facts the jury could have found appellant guilty of ordinary negligence in several respects, including that of violating certain statutory regulations relating to travel on the public roads. We have held that a series of acts of ordinary negligence may, under certain circumstances, operate to produce gross negligence but not necessarily so.

After a careful study of the facts, we have reached the conclusion that under the guest statute the appellee did not prove facts sufficient to support a finding of gross negligence and that the motion of appellant for a judgment notwithstanding the verdict should have been sustained. It is therefore ordered that the judgment of the district court as to Stanley J. Cacak be reversed and set aside, and the trial court is directed to enter judgment for said appellant, and to dismiss appellee's action as to him.

REVERSED AND ORDERED
DISMISSED AS TO APPELLANT.

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ROSEBUD LUMBER AND COAL COMPANY, A CORPORATION, APPELLANT, V. FRANK P. HOLMS ET AL., APPELLEES.
52 N. W. 2d 313

Filed March 7, 1952. No. 33104.

1. **Mechanics' Liens.** Mechanic's lien statutes are cumulative and remedial in nature requiring a liberal construction so as to effectuate their objects and purposes and protect all claimants

within their scope as well as to promote substantial justice.

2. ———. The object of the mechanic's lien law being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.
3. ———. A subcontractor who furnishes materials for a building, but whose contract was made with the contractor alone, can acquire a lien under the mechanic's lien law for such materials only as were delivered at the building for use therein, or were actually used in the construction thereof.
4. ———. The lien is given not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building.
5. ———. The sworn statement of a subcontractor for a mechanic's lien must contain a description of the premises on which the improvement was erected. Such a description is not insufficient if it renders the location of the property susceptible of ready ascertainment by the aid of extrinsic evidence.
6. ———. As a general rule an overstatement of the amount due and sought to be recovered under a mechanic's lien does not, in the absence of a dishonest intention on the part of the claimant, invalidate the lien.
7. Trial. In determining whether or not the defendant's motion to dismiss at the conclusion of the plaintiff's case should be sustained the evidence will be considered by the court in the light most favorable to the plaintiff, controverted facts will be resolved in his favor, and he is entitled to the benefit of every inference that can be reasonably deduced therefrom.
8. Trial: Equity. In an equity suit, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case. Where it appears that such dismissal of a plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Reversed and remanded.*

*Patrick J. Heaton* and *Harold E. Connors*, for appellant.

*Kepler & Knicely* and *Martin & Davis*, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

The plaintiff, Rosebud Lumber and Coal Company, a corporation, brought this action against Frank P. Holms and Louise Holms, his wife; Roy Knight and ——— Knight, his wife, first and real name unknown; and Guarantee Mutual Life Company, a corporation, defendants, in the district court for Cheyenne County to foreclose a mechanic's lien. There was no service of process upon the defendants Knight.

At the conclusion of the plaintiff's evidence the defendants moved the court to dismiss the plaintiff's petition. The court sustained this motion and dismissed the plaintiff's petition and the cross-petition of the defendant Guarantee Mutual Life Company. From the overruling of the plaintiff's motion for new trial the plaintiff appeals.

Plaintiff's petition alleged, insofar as necessary to consider here, that plaintiff, between December 12, 1949, and March 8, 1950, sold to the defendants Knight and Frank P. Holms and Louise Holms, husband and wife, certain building materials; that said materials were sold and delivered to be used, and in fact were used, in the construction of a dwelling house on the following described premises: Lot 45, Morrow's Addition to Sidney, Cheyenne County, Nebraska; and, at the times said materials were sold, defendants Holms were, and still are, the owners in fee of the above described premises. The itemized account of the materials furnished, the charges therefor, and the amount paid are set forth. The date of the filing of the mechanic's lien and affidavit are pleaded. In addition, the petition alleges that the defendant Guarantee Mutual Life Company claims a lien on the described premises by virtue of a real estate mortgage, and if such lien is valid, it is junior and inferior to the mechanic's lien of the plaintiff. Plaintiff prayed for foreclosure of its mechanic's lien, and that it be declared to be paramount to the mortgage lien of the Guarantee Mutual Life Company.

The defendant Guarantee Mutual Life Company, by answer denied generally the allegations of the plaintiff's petition not admitted, and affirmatively alleged by cross-petition that the defendants Holms made, executed, and delivered to this defendant their promissory note and mortgage to secure the note; specifically denied the validity and existence of the mechanic's lien which plaintiff seeks to foreclose; affirmatively pleaded that its mortgage be declared a first and paramount lien on the premises of the defendants Holms; and that in the event the court should determine that the mechanic's lien of the plaintiff is paramount to this defendant's mortgage lien, then an accounting be had as to the amount owing this defendant, and the property be sold to pay the liens against it. The prayer is in accordance with the cross-petition and for equitable relief.

The defendants Holms by answer denied generally the allegations of plaintiff's petition and the allegations of the defendant Guarantee Mutual Life Company's cross-petition.

The plaintiff's reply to the answer of defendants Holms is a general denial. The plaintiff's reply to the answer and cross-petition of the Guarantee Mutual Life Company admitted its corporate capacity, that it held a mortgage lien, denied that such lien was prior to plaintiff's lien, and generally denied allegations of the answer and cross-petition not admitted.

By stipulation the record shows that Frank P. Holms and Louise Holms, husband and wife, were the owners of Lot 45, Morrow's Addition to the city of Sidney, Cheyenne County, Nebraska, on or about December 12, 1949, and are still the owners of said real estate; and that plaintiff filed an affidavit and mechanic's lien with an itemized list of materials alleged to have been furnished by it for the erection of a building on the above described lot on April 26, 1950, at 4 p. m. It also was stipulated, on April 3, 1950, the defendants Holms made, executed, and delivered to the Guarantee Mutual Life

Company their promissory note in the amount of $8,700 with interest at the rate of 4½ percent per annum on the unpaid balance until paid, and on the same date, to secure the payment of the note, defendants Holms executed and delivered to the Guarantee Mutual Life Company their mortgage deed filed of record April 12, 1950. There is due the Guarantee Mutual Life Company from defendants Holms $8,383.24.

R. H. Coe testified that he is the president of the Rosebud Lumber and Coal Company, a corporation located at Winner, South Dakota, engaged in the retail sale of lumber and coal. He had business transactions with Roy Knight who posed as a contractor and builder. Roy Knight had practically finished a motel at Winner, contemplated building a mortuary in Winner, and "The man that was there said that he had three units to build at Sidney, Nebraska."

George T. Carter testified that in December 1949, he was a construction foreman for the Roy Knight Construction Company which consisted of Roy Knight and his wife Cecelia. He built a house for Frank Holms which was located at 1145 Sixth Avenue, in Sidney. He was asked: "That is the property that is in controversy here?" He answered: "I think so; yes, sir." He acted as foreman on the job from the time the basement was excavated in November 1949, until the outside work and drives were finished in the latter part of April 1950. He ordered the materials by telephone from Roy Knight who resided in Winner. This was dimensional material. Four truckloads of such material were delivered to the Frank Holms lot, 1145 Sixth Avenue, and unloaded on the lot. This material was used in the construction of the house. Some of the materials which comprised the third load delivered were rejected by him. This consisted of knocked-down windows of the old type which would not fit. On the list he sent to Roy Knight he requested weather-stripped units. The rejected materials were reloaded on

one of Knight's trucks and sent back to Winner. After that, on the fourth load, replacements were delivered by Knight's truck. There was one unit short on this load.

Alfred C. Struss testified that he was employed as a carpenter foreman for the Roy Knight Construction Company located at Winner, South Dakota. He was foreman of the building of the motel, and delivered lumber wherever it was needed on other jobs. He delivered three loads of material which he obtained from the Rosebud Lumber and Coal Company to the Frank Holms house in Sidney. He loaded the truck himself and drove it to Sidney. The deliveries were made in January and February 1950, his last trip being in February. The dimensional lumber was segregated from the other lumber in the Rosebud lumberyard and set apart. The first load delivered by him consisted of dimensional lumber pre-cut by him on one of Roy Knight's jobs. It was loaded on the truck again after being cut, and taken to Sidney to the Frank Holms residence. He did not know the street number or the lot number of the Frank Holms residence. The cement blocks had just been laid in the basement when he delivered the first load. He unloaded this material at the east side of the basement. The second load he handled consisted of shingles, shakes, flooring, and also some sheeting. He had some help in loading this material at Winner, and it was delivered to the Frank Holms residence in Sidney. The third load which he obtained from the Rosebud lumberyard from a list of material given to him by Knight, and which he loaded from this list, was taken to the Frank Holms place in Sidney and unloaded. He was accompanied at that time by George Patterson, an employee of the Knight Construction Company. He also obtained lumber from the Rosebud Lumber and Coal Company to be used in the Mason Funeral Home and the motel located at Winner. This construction work was in progress at the same time deliveries of material were being made to the Holms residence in

Sidney. Certain materials constituting a part of the third load to Sidney were rejected by Carter, the foreman on that job, and were taken back to the Rosebud lumberyard in Winner. He did not remember whether or not he made a report to the Rosebud Lumber and Coal Company with reference to the return of this lumber. He obtained no receipt evidencing return of this lumber. George Patterson made a delivery in February when this witness was in the hospital. He entered the hospital in Winner on February 17, 1950, and was discharged therefrom on February 22, 1950. No deliveries were made to the Holms house after the delivery made by Patterson. This was the fourth load of material.

George Patterson testified that he is engaged in carpenter work and in building, and was employed by the Knight Construction Company of Winner, South Dakota. He brought one load of material to Sidney to the Frank Holms residence which was being constructed at that time. It was a split load part of which came from the Rosebud Lumber and Coal Company, that he loaded. It consisted of miscellaneous finished lumber and millwork. He helped unload this material in Sidney the last Sunday in February 1950. At that time Struss was at home in Minden. He had been released from the hospital and was not working. He saw some building lumber that was sent to Sidney by a common carrier. He did not know the name of the carrier that was employed to haul it. He believed this material consisted of a window and a door that had not arrived at the time he made his delivery to Sidney. He further testified the millwork is all kept separate from the rest of the lumber in the Rosebud lumberyard. The last load he delivered had a different order number that apprised him of the material that had been purchased by the Knight Construction Company. He also testified to the manner in which the fourth load that he delivered to

Sidney was unloaded by the foreman on the job and himself.

Alfred Struss was recalled and testified that he sent some material which he obtained from the Rosebud Lumber and Coal Company to Sidney after Patterson had delivered the fourth load of material. This consisted of a door and window, and was sent after he returned from Minden, which was either the 5th or 6th of March 1950.

R. G. Coe was recalled and testified that the employees of the Knight Construction Company picked up the lumber from the Rosebud lumberyard to be sent to Sidney; that he made an itemized list of the lumber delivered to arrive at a price on it; that exhibit No. 1 is an itemized list of these materials; that the total charge for the same is $2,858; that $800 has been credited to the account; and that $2,058 is still owing, for which the corporation has not been paid. On cross-examination he testified he furnished materials to Mr. Knight for three jobs: One, the finishing of the motel at Winner; another, the construction of a mortuary in Winner; and the third was for what was designated as project No. 1 at Sidney, Nebraska, known as the Holms house. He also testified that at the time he prepared to file his mechanic's lien he had a conversation with Knight's foreman, Carter, with reference to the materials that went into the construction of the Holms house; also, he had no knowledge of any replacements being sent to the Holms residence; that all the millwork which had been ordered was in the Rosebud lumberyard February 25, 1950; and that a small shipment was made later on.

The foreman, George T. Carter, was recalled and testified that after the fourth delivery was made by Mr. Patterson there was one other delivery made to the Holms house by common carrier, which consisted of a single window and a slab door. He was then asked to examine exhibit No. 1, the itemized statement of the

account with the Rosebud Lumber and Coal Company under dates of February 25, 1950, and March 8, 1950, and advise whether or not the window and slab door which were purportedly delivered by the common carrier in Sidney subsequent to the time Patterson delivered the last load were shown on that exhibit. He testified they were not. The material was received and used.

The plaintiff assigns as error (1) the judgment of the trial court is contrary to the evidence and the law, and (2) the trial court prejudicially erred in sustaining defendant's motion to dismiss the plaintiff's petition.

Section 52-102, R. S. 1943, provides in substance that any person or subcontractor who shall furnish any material for any of the purposes mentioned in section 52-101, to the contractor, or any subcontractor who shall desire to secure a lien upon structures mentioned in said section may file a written statement of the amount due him for material, together with a description of the land upon which the same was used, within 60 days from the furnishing of such material, with the register of deeds of the county wherein said land is situated. If the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due for such material on such lot or lots and the improvements thereon from the same time and in the same manner as the original contractor.

"The trend of all recent decisions is to hold that mechanic's lien statutes are cumulative and remedial in nature requiring a liberal construction so as to effectuate their objects and purposes and protect all claimants within their scope as well as to promote substantial justice." Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298. See, also, Way v. Cameron, 94 Neb. 708, 144 N. W. 172; White Lake Lumber Co. v. Russell, 22 Neb. 126, 34 N. W. 104, 3 Am. S. R. 262; Henry & Coatsworth Co. v. Fisherdick, 37 Neb. 207, 55

N. W. 643; Central Const. Co. v. Highsmith, *ante* p. 113, 50 N. W. 2d 817.

"In an equity suit, when the defendant moves for a dismissal of the plaintiff's action at the close of plaintiff's evidence he thereby admits plaintiff's evidence to be true, together with every inference which fairly and reasonably may be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and plaintiff has made a prima facie case, the motion to dismiss should be overruled." Paul v. McGahan, 152 Neb. 578, 42 N. W. 2d 172.

The trial court found that the evidence was not sufficient to establish and prove a valid contract between the plaintiff, who would be the subcontractor, and the contractor Roy Knight.

In the case of Great Western Manufacturing Co. v. Hunter Bros., 15 Neb. 32, 16 N. W. 759, the court said: "From an examination of this section it must be apparent that it makes no difference what the nature or character of the contract may be, whether special, or parol, verbal, or written, express or implied. If the contract and delivery, or furnishing under it, is sufficient to create an indebtedness or liability, it is sufficient to create a lien under the provisions of this section."

The relationship between a contractor and an owner rests in the contract, express or implied, but there is no privity of contract between the subcontractor and the owner. See Frost v. Falgetter, 52 Neb. 692, 73 N. W. 12.

In Marrener v. Paxton, 17 Neb. 634, 24 N. W. 209, an action to foreclose a subcontractor's lien, the court said: "We have no doubt that in a proper case, one furnishing materials in good faith for the erection of a building under an agreement with a contractor for that purpose, may file a mechanic's lien upon the structure and the lots on which it stands. The lien is given, however, not upon the ground that a contract was made by the owner with such subcontractor, but because the material so

furnished was used in the erection of the building. * * * Where, however, a subcontractor seeks to charge the owner, it devolves on him to show either that the material furnished by him was used in the erection of the building, or at least that he delivered it there under an agreement with the contractor that it would be used in the erection of the building on which the lien is sought." See, also, Way v. Cameron, *supra.*

In the light of the foregoing authorities we conclude the trial court erred, as contended for by the plaintiff.

The plaintiff contends the trial court erred, in dismissing its petition, in finding that the evidence was insufficient to show the plaintiff furnished material that was delivered to property owned by defendants Holms or used in the construction of a house on Holms' property.

The affidavit of the plaintiff states that the itemized statement of account of the materials is a true and correct account of the materials furnished by it for Roy Knight and Frank P. Holms on an oral contract for materials furnished for the erection of a house on Lot 45, Morrow's Addition to Sidney, Nebraska. The plaintiff's petition so pleads. The parties stipulated that Frank P. Holms and Louise Holms, his wife, were the owners of Lot 45, Morrow's Addition to Sidney, on December 12, 1949, and are still the owners of such property. The defendants assert that throughout the remainder of the record the property as above described is never mentioned; that no witness testified that material was ever delivered to, or used in the construction of a building on, that property; the evidence shows only that a house was built for Frank P. Holms at 1145 Sixth Avenue. The foreman for the Knight Construction Company testified that was the property in controversy. The defendants Holms and defendant Guarantee Mutual Life Company were not misled, nor does the evidence show that they were in any manner deceived as to the materials delivered and used in the construction of the

Holms house. The evidence shows that on one occasion the defendants Holms were present and talked to Mr. Patterson who delivered the fourth load of materials to the Holms lot, and wanted to know why Struss, who had made the previous deliveries, had not delivered this load of material.

The statute requires that in the affidavit filed to procure a subcontractor's lien there should be such a description of the real estate as, aided by extrinsic evidence suggested by the description itself, would charge a party dealing with real estate with notice of the lien claimed against it. See Drexel v. Richards, 50 Neb. 509, 70 N. W. 23. See, also, Guiou v. Ryckman, 77 Neb. 833, 110 N. W. 759, 124 Am. S. R. 877; Way v. Cameron, *supra;* Rucker v. Steelman, 73 Ind. 396; Holden v. Mensinger, 175 Cal. 300, 165 P. 950.

Under the evidence the plaintiff has established a prima facie right to enforce the mechanic's lien. The trial court erred as contended for by the plaintiff.

The plaintiff contends the trial court erred, in sustaining the defendants' motion to dismiss its petition, in finding the evidence was not sufficient to prove the fair and reasonable value of the materials furnished by the plaintiff.

The president of the plaintiff corporation testified that exhibit No. 1 was an itemized list of the materials that were sent to Sidney and the charges made thereon in the amount of $2,858, upon which account $800 had been paid and there was owing $2,058. There was no objection to the showing that the prices set forth in the list were not correct, or that the items for profit or the discounts allowed were not reasonable and fair. The evidence shows prima facie what the reasonable cost of the material was and is not controverted.

There is evidence that might disclose excessive charges or overcharges on certain items appearing in the itemized list of materials furnished.

Where the amount indicated was claimed in excess

of that actually due, an overstatement in a claim for a mechanic's lien of the amount due will not, when arising from an honest mistake or an inadvertence free from fraudulent intent, vitiate the lien for the sum actually due. Cases holding to the above rule of law are too numerous to cite. See annotation in 29 L. R. A. N. S. 306. See, also, Kneeland on Mechanic's Liens (2d ed.) § 165, p. 179; Central Const. Co. v. Highsmith, *supra.*

There is no evidence, if the itemized list of material contains an overstatement of the amount due and sought to be recovered by virtue of the mechanic's lien, that such was made intentionally and with a design to defraud. In the state of the record at this time, the defendant's contention as to an overcharge being made by the plaintiff cannot be sustained.

The plaintiff contends that the trial court erred, in dismissing its petition, in finding that the mechanic's lien filed on April 26, 1950, at 4 p. m., was not filed in time as provided for by law. While there is some conflict in the evidence, it does appear that the last delivery made by the witness Patterson, using the Knight Construction Company truck, was on February 26, 1950. There is also evidence that a window and slab door were delivered to the premises by a common carrier either the 5th or 6th of March 1950. The itemized statement of account of materials furnished by plaintiff shows the charges made therefor and the materials furnished at that time, as of March 8, 1950. These last items were not replacement items. It is apparent from this evidence that the mechanic's lien of plaintiff was filed in time as provided for by law.

Other assignments of error need not be discussed.

Being mindful of the rule heretofore set out, when defendant moves to dismiss plaintiff's case at the close of the plaintiff's evidence the defendant thereupon admits the plaintiff's testimony to be true, together with every inference which may fairly and reasonably be

drawn therefrom. We conclude, by the plaintiff's evidence and the authorities cited, the plaintiff has made a prima facie case.

Where it appears that such dismissal of the plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial. Paul v. McGahan, *supra*.

The judgment of the trial court in dismissing the plaintiff's petition and in dismissing the cross-petition of the defendant Guarantee Mutual Life Company, a corporation, is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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THOMAS R. P. STOCKER, APPELLANT, V. FRANK E. WELLS ET AL., APPELLEES.
52 N. W. 2d 284

Filed March 7, 1952. No. 33113.

1. **Appeal and Error.** When a case is sent back by the Supreme Court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein.
2. **Costs.** A person who has been brought in as a party to an action between others is ordinarily entitled to recover his costs if no cause of action against him is established and he is not shown to have any interest in the subject matter of the litigation.
3. ———. Unless it appears that depositions were not taken in good faith or were actually unnecessary, costs of taking them are properly taxable although they were not used at the trial.
4. ———. The questions of good faith and reasonable necessity are for a trial court to determine, but the discretion conferred upon it by section 25-1711, R. R. S. 1943, in taxing costs is not arbitrary but a legal one to be exercised within the limitations of legal and equitable principles.

APPEAL from the district court for Nemaha County: THOMAS E. DUNBAR, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

*T. R. P. Stocker*, pro se, for appellant.

*Ferneau & Kiechel*, and *Lee Kelligar*, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

On July 16, 1948, this court decided Stocker v. Wells, 150 Neb. 51, 33 N. W. 2d 445, wherein plaintiff sought and secured a mandatory injunction in the district court requiring defendants Lehr and Wells to remove certain connected dikes constructed by them upon their adjacent premises, and enjoining them from constructing, maintaining, or erecting any dike or dikes that would impede the natural floodwaters of the Nemaha River. In that opinion we reversed the judgment and dismissed the action as to defendants Lehr, and affirmed in part and reversed in part the judgment against defendants Wells, and remanded the action against such defendants in part with directions.

The opinion concluded by saying: "The costs of the defendants Lehr are taxed to the plaintiff; all other costs are taxed to the defendants Wells."

Thereafter on August 4, 1948, plaintiff filed a motion in this court to clarify that portion of the opinion dealing with costs, in order that the method of arriving at the costs might be made definite and equitable in this court and guide the trial court in the taxation of costs in that court. The motion was overruled on September 22, 1948.

On October 5, 1948, the mandate issued from this court. Insofar as important here, it ordered and adjudged that in conformity with the opinion, made a part thereof, defendants Lehr should recover from plaintiff their costs in this court, taxed at $105.95, and also that plaintiff should recover from defendants Wells his costs taxed at $123.75, for which execution was awarded.

Thereafter on November 4, 1948, plaintiff filed in this court a "Motion to correct mistake, omission, and neg-

lect of clerk and to require costs to be taxed in accordance with opinion." The costs in this court taxed against plaintiff in favor of defendants Lehr included one-half cost of transcript from district court, one-half cost of printing brief, and one-half the docket fee. The costs in this court due plaintiff from defendants Wells included one-half the appearance fee and one-half the amount taxable for plaintiff's briefs. Such motion was overruled on November 8, 1948.

Thereafter on March 21, 1951, defendants Lehr filed a motion in the district court to tax the costs in that court. After a hearing thereon, whereat evidence was adduced by the parties, the trial court by written order sustained the motion and purportedly in accordance with the mandate of this court found and adjudged that defendants Lehr should recover from plaintiff $290.16 taxed as costs against plaintiff. It further found and ordered that certain depositions taken by plaintiff at a cost of $39.57 were unnecessary and should be disallowed as costs. Other small items taxed to plaintiff are not involved here. All other costs were taxed to defendants Wells. Therefrom plaintiff appealed to this court, assigning that the findings and order were not sustained by the evidence but contrary thereto and contrary to law and the mandate of this court. We conclude that the assignments should be sustained in part with regard to witness fees and mileage of two witnesses who were called and testified "on behalf of the defendants" and sustained in toto with regard to disallowance of the cost of depositions taken by plaintiff. Otherwise we conclude that the findings and order were correct and that the assignments have no merit.

As a matter of course it was the duty of this court when it disposed of the case as aforesaid to tax costs as in its discretion the equities of the cause required, as provided in section 25-1933, R. R. S. 1943. In that connection, three times this court has concluded that it did so in the case at bar, and in that connection also it was

the duty of the district court to obey the mandate of this court. As held in De Lair v. De Lair, 148 Neb. 393, 27 N. W. 2d 540: "When a case is sent back by the Supreme Court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein."

In order to determine whether or not that was done, we have carefully examined every item taxed in favor of defendants Lehr and against plaintiff. In doing so we discover that the trial court obeyed the mandate of this court in every particular and did not abuse its discretion except in the taxation of fees and mileage of two witnesses which, apparently by oversight, were all taxed to plaintiff. In that regard two witnesses, C. A. Shannon and Roy N. Towl, were called by defendants to testify "on behalf of the defendants." The total sum of their witness fees and mileage, $20, was taxed in favor of defendants Lehr and against plaintiff, when only one-half thereof, or $10, should have been so taxed. The other one-half, or $10, should have been taxed in favor of plaintiff and against defendants Wells. Whether or not defendants Lehr or Wells or both of them made certain payments to such witnesses for professional services was beside the point and not controlling because they both testified as expert witnesses called by and on behalf of all defendants.

We turn then to taxation of costs for the bill of exceptions. The record discloses without dispute that defendants Lehr paid $255.50 for one-half the cost of the bill of exceptions, and that defendants Wells paid the other one-half. The trial court, doubtless attempting to follow the mandate of this court and observing that it had taxed plaintiff with one-half the costs of the transcript, brief, and docket fee in this court, taxed one-half the bill of exceptions to plaintiff in favor of defendants Lehr. We sustain the order in such respect.

It is generally the rule that: "A person who has

been brought in as a party to an action between others is entitled to recover his costs if no cause of action against him is established and he is not shown to have any interest in the subject matter of the litigation." 14 Am. Jur., Costs, § 30, p. 20; 15 C. J., Costs, § 200, p. 102; 20 C. J. S., Costs, § 113, p. 354.

The second sentence of the last citation reads: "Where some of the defendants are unsuccessful, however, plaintiff is entitled to recover of them the costs incurred in the joint defense or otherwise, except such as may be separated therefrom as having exclusive reference to the defendant who is discharged."

Plaintiff relying thereon argued that the bill of exceptions was predominantly concerned with evidence relative to the case against defendants Wells instead of defendants Lehr, and that all except a small portion of the cost thereof should be taxed against defendants Wells in favor of plaintiff. In other words, plaintiff contends that he should be taxed for not to exceed 15 pages of the bill of exceptions whereat testimony appeared allegedly having exclusive reference to the Lehr dike. The answer is not that simple.

Plaintiff himself and not defendants Wells brought this action against all defendants, the issues of which presented a complicated over-all drainage problem involving not only the lands of plaintiff and defendants but also adjacent territory as well clear across the entire west valley of the Little Nemaha River. As we view the record, the evidence related itself generally to the whole problem presented. Viewed in such light the judgment against defendants Lehr was reversed. It should be noted also that the judgment against defendants Wells was reversed in part.

Further, in his original petition plaintiff among other things said: "That by reason of the facts herein set forth said dams or dykes constitute a nuisance and unless abated will cause irreparable damage to this plaintiff and other land owners affected thereby. That said

irreparable injuries to the property of this plaintiff, his land and his crops are the result of the acts of each of said defendants, and that said result and injuries have been and will be increased by reason of the concurrent and combined acts of all of said defendants. The plaintiff alleges further that said defendants have agreed and conspired together to do the acts herein complained of in order that by their combined acts and the use of the public highway and the joining of all the dams and dykes constructed, the same constitutes one immense long continuous dam or dyke surrounding the defendant's real estate on all sides and preventing the natural flood water to follow its accustomed course over and upon said defendant's lands, to the great permanent and continuous injury to plaintiff's land." The effect of the trial court's decree was to generally sustain all such allegations except the charge of conspiracy and to tax all costs equally against defendants Lehr and Wells. Defendants each filed separate motions for new trial, and when they were overruled each filed separate notices of appeal. Defendants Lehr, in order to obtain the relief to which they were entitled, were required to perfect an appeal which necessitated the preparation and cost of a bill of exceptions to be presented to this court. They paid one-half the cost and were successful in the appeal. Plaintiff was responsible for its necessity and should be liable to defendants Lehr therefor, as held by the trial court. No other conclusion would be just or equitable.

The sum of $39.57, cost of certain depositions taken by plaintiff but not used at the trial, was disallowed as unnecessary. Plaintiff assigned such disallowance as erroneous. We sustain the assignment.

The applicable rule is stated in Farmers Union Fidelity Insurance Co. v. Farmers Union Co-Operative Insurance Co., 147 Neb. 1093, 26 N. W. 2d 122: "In regard to unused depositions we think the following is the

correct rule: ' * * * unless it appears that the depositions were not taken in good faith or were actually unnecessary, costs of taking them are properly taxable although they were not used at the trial; and * * * that costs are taxable for depositions not used because the witness attends and testifies in person, if the party taking the depositions acted in good faith * * * where its use is rendered unnecessary or impossible by the act of the opposite party; * * * The questions of good faith and reasonable necessity are for the trial court to determine; and in determining them it will bear in mind that a deposition, at the time of the taking thereof may be apparently necessary in the sense that the party cannot safely proceed to trial without it, although afterward the case may take such a course as to make it unnecessary to use the deposition.' 20 C. J. S., Costs, § 194a-1, p. 425." It will be observed also that the discretion conferred on the trial courts by section 25-1711, R. R. S. 1943, in taxing costs is not arbitrary but a legal one to be exercised within the limits of legal and equitable principles. In re Clapham's Estate, 73 Neb. 492, 103 N. W. 61.

In that connection we find nothing in the record before us which in any manner established that the depositions were not taken in good faith or were actually unnecessary. In fact the evidence establishes the contrary without dispute, and we conclude that under the circumstances presented the cost of such depositions should have been taxed in favor of plaintiff and against defendants Wells.

For the reasons heretofore stated we conclude that the order of the trial court taxing costs should be and hereby is affirmed in part and reversed in part, and the cause is remanded with directions to enter an order taxing costs in conformity with this opinion. All costs of this proceeding in both the district court and this court are taxed in favor of plaintiff and against defend-

ants Lehr and Wells, each being required to pay one-half thereof.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLEE, V. NOEL COVER ET AL., APPELLANTS.
52 N. W. 2d 243

Filed March 7, 1952. No. 33116.

**Contracts.** Courts will not resort to construction where the terms of a contract are clear and plain and the interests of the parties are clearly expressed.

APPEAL from the district court for Dawson County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

*Baskins & Baskins,* for appellants.

*Crosby & Crosby,* for appellee.

Heard before SIMMONS, C. J., YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Platte Valley Public Power and Irrigation District, a public corporation, plaintiff and appellee, against Noel Cover and Nellie Cover, defendants and appellants, to recover two payments each in the amount of $2,750 with interest at the rate of seven percent per annum which were past due on a written contract of sale of certain land in Dawson County, Nebraska. One payment became due on April 7, 1949, and the other on April 7, 1950.

The contract was entered into on April 7, 1947. It provided for a total consideration of $14,000, $3,000 of which was to be in cash, $2,750 on April 7, 1948, and an equal amount on April 7 of the three succeeding years. The

deferred payments were to draw interest at four percent per annum. The cash payment and payment of the first installment were made. The defendants were in default of payment of the principal of the second and third installments when this action was instituted. They were also in default of interest which accrued after the due dates of the two installments.

These facts are all admitted in the answer of the defendants. There is in the answer of the defendants no denial or traverse of any of the allegations upon which the plaintiff bases a right of recovery. The answer admits that under the terms of the written contract on which the action is predicated they are indebted as claimed by the plaintiff.

In an effort not in defense but in avoidance of this obligation the defendants have filed a cross-petition.

By their cross-petition they allege substantially that by the terms of the contract of purchase they waived damages to the land purchased caused by certain structures maintained thereon by plaintiff, which structures do not require description here, and agreed to continued maintenance thereof by plaintiff. These allegations are factually reflected in the contract.

They further allege that they are owners of land adjoining the land purchased under the contract and that they have learned that the plaintiff construes the contract to mean that the defendants have also waived damages to these other lands and personal property and crops located thereon caused by the structures on the land purchased under the contract. This construction they allege is invalid and was never agreed to by the parties.

By their prayer they asked the district court to interpret the contract and to interpret it in such manner as to declare that the waiver of the contract applies only to damages to the land described in the contract. They seek other relief but in the light of the response to the allegations of the cross-petition and the evidence

as contained in the bill of exceptions this becomes unimportant here.

The reply denies that the plaintiff ever construed the contract as a waiver of damages to lands other than those described in the contract. In addition to this in the only evidence adduced on the trial on the subject, it was unequivocally denied that any such construction had been placed on the contract. On the record which comes here therefore the parties are definitely in accord on the proposition that the contract by its terms does not contain a waiver as to other land and that the plaintiff has not placed and does not place on it any such interpretation.

It is true that the record discloses that in an action by defendants against the plaintiff for damages to and upon the adjoining lands the plaintiff here has pleaded that the defendants here are estopped to assert a claim for such damages because of knowledge which they had of conditions when the contract in question here was entered into. That defense however in nowise depends upon the terms of the contract, any claimed representations as to what the parties considered that it embraced, or any mutually considered inducements to the contract. The validity of the defense is for determination in that action and not in this one.

On the record the district court dismissed the cross-petition and rendered judgment in favor of plaintiff for the two delinquent installments with interest at four percent per annum from date of default until judgment. Interest was allowed on the judgment at the rate of six percent per annum.

The defendants filed a motion for new trial which was overruled. From the order overruling the motion for new trial and the judgment they have appealed.

From the facts as they have already been outlined it is clear that the cross-petition presents nothing for determination. There is nothing in the light of the record for the court to construe.

Courts will not resort to construction where the terms of the contract are clear and plain and the interests of the parties are clearly expressed. In re Ordean's Will, 195 Minn. 120, 261 N. W. 706; 17 C. J. S., Contracts, § 294, p. 683.

The defendants, as pointed out, agree that under the terms of the contract they are indebted to plaintiff as claimed.

The judgment of the district court is therefore affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

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FRED A. RAHFELDT, APPELLANT, V. ARNOLD W. SWANSON, DOING BUSINESS AS ARNOLD W. SWANSON & COMPANY, ET AL., APPELLEES.
52 N. W. 2d 261

Filed March 7, 1952. No. 33125.

1. **Workmen's Compensation.** The right of recovery in a workmen's compensation case is statutory and the burden is on the claimant to establish the facts essential to an award.
2. **Appeal and Error: Workmen's Compensation.** An appeal in a workmen's compensation case will be by this court considered de novo upon the record.
3. **Workmen's Compensation.** An award of compensation under the Nebraska Workmen's Compensation Act may not be based on possibilities, probabilities, or conjectural or speculative evidence.
4. **Appeal and Error: Workmen's Compensation.** In such a case if the evidence is in irreconcilable conflict the court may upon a trial de novo consider the fact that the district court gave credence to testimony of some witnesses rather than contradictory testimony of other witnesses.
5. **Trial: Courts.** A court is not required to permit a litigant to trifle with the processes of the court by asserting therein under oath at different times the truth of each of two or more contradictory versions of an event or events in controversy according to the necessities of the particular occasion presenting itself.

APPEAL from the district court for Knox County: LYLE E. JACKSON, JUDGE. *Affirmed in part and reversed in part.*

*J. E. Willits,* for appellant.

*Deutsch & Jewell,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This case involves a claim of appellant against appellees for benefits provided by the Nebraska Workmen's Compensation Act.

The claim of appellant as stated in his petition in district court is that on the 23d day of July 1948, he was employed by Arnold W. Swanson; that New York Casualty Company was his compensation insurance carrier; that appellant on that date suffered personal injuries by an accident arising out of and in the course of his employment consisting of a fracture across the trochanteric area of the right hip, severe bruises and nervous shock, and a right inguinal hernia; that his injuries affected his right foot, arms, back, spine, shoulders, and the use and functions of them; that his injuries and disabilities therefrom are "permanent and practically total"; and that his weekly wage was $106.75. The answer of appellees, insofar as important to this appeal, is a denial of the petition of appellant.

The district court found as follows: That appellant on July 23, 1948, sustained a fracture across the trochanteric area of his right hip; that he had surgical, hospital, and nursing services on account thereof; that he was because of the injury temporarily totally disabled until January 21, 1949, a period of 26 weeks at which time temporary disability terminated; that he had a 10 percent permanent partial disability to his right leg by reason of the injury to it; and that no other injury or disability claimed by appellant was

caused by or was referable to the accident involved in the case.

That the hernia claimed to have been caused by the accident on July 23, 1948, to the right side of appellant existed before it and any disability resulting was not caused by it; and that there was no evidence of increased disability of appellant because of the hernia or any aggravation of it by the accident of July 23, 1948, and he was entitled to no compensation because thereof.

That appellant was entitled to recover for the temporary total disability suffered by him $18 a week for 26 weeks the sum of $468 less the payments made him by appellees amounting to $461.71 or a balance on that account of $6.29, and for 10 percent permanent partial disability to his right leg $18 a week for 21½ weeks the sum of $387 or a total of $393.29 due and unpaid to fully compensate for all disability of appellant resulting from the accident of July 23, 1948; and that appellant should recover the balance of expenses incurred by him for travel to and from doctors and the hospital amounting to $107.44.

The court rendered judgment for appellant and against appellees for $500.73. The court also required appellees to pay, in accordance with the medical and hospital fee schedule promulgated by the Nebraska Workmen's Compensation Court, the fees incurred for an operation for the reduction and repair of the hernia on the right side of appellant, the fees for the operation for the removal of the steel blade plate inserted at the site of the fracture in the right leg of appellant, and the hospital fees while appellant was hospitalized incidental to the operation, provided he elected to and did submit to the operation within 60 days of June 18, 1951.

Appellant contends that the evidence shows and that the district court should have found that he is totally disabled and the court should have awarded him recovery on that basis. The record advises that he was taken to a hospital in Sioux City, Iowa, soon after he

was injured on July 23, 1948, and that he was cared for by Dr. O'Donoghue who had specialized in orthopedic surgery and treatment of fractures for 30 years. The history the appellant gave the doctor was that a few hours previously while he was working with a hammer in his right pocket resting against his right hip he fell and landed on the head of the hammer. He complained of no injury other than to his right hip. The doctor examined him with the assistance of X-ray and found a fracture across the trochanteric area of the right hip. The fracture was on July 26, 1948, after the patient had recovered from shock, openly reduced and held with a stainless steel blade plate. Appellant was confined in the hospital 15 days after the operation and when he was discharged his physical condition was excellent. He could not bear weight on his right leg at that time but moved about with the aid of crutches.

He called on the doctor on October 7, November 4, December 14, 1948, and April 20, 1949. The doctor took X-rays and examined him on each visit. On the first of these dates his hip was "doing very well" but he had a mass in his right groin "which he did not have when we first saw him at the hospital." It was diagnosed as a right inguinal hernia. On November 4 he was allowed to put some weight on the fractured hip. On December 14 "the hip was completely healed. We told him to discard his crutches and do as much work as he wanted to." On that date he wanted to drive a car from the State of Iowa to Phoenix. He was examined the last time on April 20, 1949, and the doctor found that his hip was entirely normal in every way. The X-ray examination showed the hip was perfect. The place where it was broken could not be seen. He then had no permanent disability of any kind, occupational or otherwise, as a result of the fracture of his hip. His hip was as good as it was before the accident. The doctor based his conclusion that appellant had no permanent disability and would not have in the future because of the fracture

on his many years of experience in treating many hundreds of previous injuries, and the fact that even an X-ray did not show the fracture after it healed; that it healed without leaving any residuum; that the angle or inclination of the shaft of the femur was perfectly normal; that the density of the bone on the broken side was normal; that he had full range of passive movement of the hip joint; and that there was no appreciable muscle atrophy.

Appellant was given six months of temporary total disability because the bone was not strong enough to carry weight without support for about four months, and the additional two months were to get the muscles limbered up and strength back in them. The length of his right leg was not affected or changed as a result of the injury. The doctor had no record or recollection of any complaint of the appellant of pain in or between the shoulders. There were no nerves affected by the operation and the doctor did not tell appellant that there were. It is not necessary to remove the plate from the hip of appellant because of the type of fracture that he had. The plate will not change and it will not affect the physical parts or tissues of the body of appellant in any way. Dr. O'Donoghue was the only doctor who was consulted and who did anything for appellant after he arrived at the hospital on the day of the accident until May 4, 1949, a period of about 10 months.

Appellant was examined on August 11, 1949, by Dr. Johnson, a specialist in orthopedic surgery since 1924, and an instructor on the subject of fractures in the Medical College of the University of Nebraska since 1925. He found that the "fracture line through the intertrochanteric region is held in perfect position," there was complete union at the site of the fracture, and the bone and the apposition were in perfect position. The motions of the right hip joint were within normal limits except internal rotation was limited to one-half

normal. There was slight atrophy of the right thigh above the patella. The two hips were identical except there was a little bone atrophy or decalcification. There was no shortening of the right lower limb. There was no condition or disability except as stated above that could be attributed to the fracture of the right leg of appellant. The conclusion of Dr. Johnson was that appellant had "a ten per cent permanent partial impairment of the right lower extremity" and this was based on the objective findings that there was "some limitation of the motion of the hip and some atrophy of the limb." His opinion was that appellant could have on August 12, 1949, resumed his employment as a carpenter and performed all its requirements, and that a 10 percent disability "is a relatively small disability" and was not great enough to keep Mr. Rahfeldt from following his occupation as a carpenter.

Walter E. Dutton, a chiropractor of 2½ years experience in that field of healing art, testified that he was told on May 4, 1949, by appellant that he had an accident and fell off "whatever it was he was on"; that he broke his right leg and sustained "some other spinal injuries" causing pain in his upper back, shoulders, and especially his arms; and that his examination developed the existence of a left rotation of the bodies of the upper dorsal vertebra, a right rotation of the bodies of the lumbar vertebra, and an inferiority of the right ilium. These caused the sacrum to be off balance, and that abnormal rotation of a vertebra may cause pressure on soft tissue structure surrounding the spinal nerves and this may produce pain in the extremities. The right leg of appellant was shorter than the left. A fall from a scaffold could have been the cause of the abnormal rotations of the spine and the shortness of the right leg could have aggravated the condition. Appellant had "a bunching of the muscles" above the third dorsal vertebra. It appeared to be irritating and appellant complained of it and pains in his arms. This condition yielded to chiropractic

treatment. He thought the unsatisfactory conditions of appellant as described by him were of traumatic origin, but he had or gave no estimate or opinion of any degree of disability caused by them or any of them or the probable duration thereof.

Dr. Schroeder examined appellant about the first of July 1949, about a year after the accident. The history given him was that appellant had his hip fractured in a fall; that he sustained a hernia; and that he had "been sore and stiff all over, unable to perform his usual duties; that the joints generally in his body have been sore and achy." The findings of the doctor were "moderate kyphosis and scoliosis to the left in the middorsal region," arthritic changes in the spine, atrophy in the right leg, and right inguinal hernia. His diagnosis was "that much of this arthritis is traumatic or at least seriously aggravated by this fall," and he believed that plaintiff had about 50 percent or more disability. This doctor gave as his qualifications that he was a graduate of the medical school of the University of Iowa and had practiced in Marshalltown, Iowa, 13 years. He made no segregation of the degree of disability he believed resulted from the injury to the leg or the degree of disability in the back or the degree of disability by reason of the hernia. It is speculation whether the hernia and its effect were the principal basis of the opinion of the doctor as to disability or how much or how little importance he placed upon it. The evidence to warrant an award in this kind of a case must be more than conjecture or speculation. The history given the doctor was, with the exception of the hip injury, at variance with what the claimant had said about the accident and the effect upon him on prior occasions.

Examination by Dr. Johnson of appellant was about one month after Dr. Schroeder saw him. Dr. Johnson found that whatever disturbance there was in the bones and joints of the spine was not the result of trauma but was the result of infection or degeneration, a gradual

chronic disease often aggravated by hard work which produces changes in the spine; that it could not be connected up with the accident because there was nothing suggestive of that; that what osteoarthritis he had was of long standing; and that he "probably has had an arthritic spine for a minimum of five years."

Any right of recovery in this case is statutory and the burden is on the claimant to establish the facts essential to an award. An award of compensation may not be based on possibility, probability, or conjectural or speculative evidence. Miller v. Schlereth, 152 Neb. 805, 42 N. W. 2d 865; Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1. It is the rule that on appeal to this court in a workmen's compensation case it must be determined de novo upon a consideration of the record but in such a case if the evidence is in irreconcilable conflict the court may upon a trial de novo consider the fact that the district court gave credence to testimony of some witnesses rather than contradictory testimony of other witnesses. Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522; Meester v. Schultz, 151 Neb. 614, 38 N. W. 2d 739.

The temporary total disability of appellant resulting from the accident of July 23, 1948, did not continue beyond the 21st day of January 1949, and the permanent disability of appellant resulting from the fracture of his right leg in the accident did not exceed 10 percent.

Appellant contests the findings of the district court that he did not sustain a hernia of his right side in the accident of July 23, 1948. He testified at the trial in district court that he had a hernia; that he first noticed it when he got out of bed at the hospital and took a bath; that he called it to the attention of Dr. O'Donoghue and he advised appellant to secure and wear a truss until the hernia was corrected; that it was on his right side; and that he did not have a rupture on that side and never wore a truss before the accident. He denied that he testified before the compensation court in this

case that he wore a truss before the accident; that he had a truss on that had to be and was removed from his body after the accident; or that he had purchased a truss in a drugstore in Hastings.

The trial of the case was adjourned and the testimony of Albert Arms, one of the judges of the compensation court who heard and decided this case therein, was produced. It was that appellant when examined under oath testified he was wearing a truss for a hernia at the time of the accident; that he bought the truss in Hastings; and that he was ruptured about the middle of June 1948. There was evidence that appellant was wearing a truss when he was taken to the office of a doctor the day of the accident and that it was taken off of him when he was undressed in the office. The evidence further was that it was worn for a hernia and that it was "pretty well worn." Dr. Johnson stated that appellant told him that he developed a right inguinal hernia a short time before the injury to his right hip.

Appellant was examined again during the trial after the testimony of Judge Arms had been taken and he then stated that he had an injury to his left side in June of 1948; that he thought his injury was a rupture; that he went to Hastings, bought a truss, put it on, and wore it until it was taken off after the accident on July 23, 1948; and that the hernia he claims compensation for in this case is on the right side.

Appellant within one month testified in the district court to opposite statements concerning the hernia. He gave oath to a third version in the compensation court. An appropriate and sufficient comment here is that courts are not required to permit a litigant to play fast and loose with the processes of the court by insisting at different times under oath on the truth of each of two or more contradictory versions according to the necessities of the particular occasion presenting itself. Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381; Peterson v. Omaha & C. B. St. Ry. Co., 134 Neb. 322, 278

N. W. 561; Ellis v. Omaha Cold Storage Co., 122 Neb. 567, 240 N. W. 760. Conduct of this kind merits neither toleration nor reward. It is concluded that the evidence fails to show that appellant suffered a hernia or any aggravation thereof as a result of the accident of July 23, 1948.

The cross-appeal contests the order of the district court requiring appellees to furnish and pay the expense of hospitalization and surgery for the repair of the hernia of appellant, for the removal of the steel plate placed in his right leg at the time of the operation for the reduction of the fracture, and to pay appellant compensation during the period of his hospitalization and convalescence incident to the surgery.

What has been said herein about the evidence concerning the hernia by appellant is sufficient for a determination that the appellees are not responsible or liable for any expense required for the repair of the hernia. There is a failure of evidence that it is necessary or desirable to remove the plate from the right leg of appellant. There is convincing evidence that it is not. The suggested evidence to the contrary is exhibit M. The offer of this was objected to and the exhibit should have been refused. It was not identified and no foundation is shown for its admission in evidence. The rule that only competent evidence is admissible over objection applies in a compensation case. Chambers v. Bilhorn, Bower & Peters, Inc., 145 Neb. 277, 16 N. W. 2d 173; Hamilton v. Huebner, *supra*. The cross-appeal should be and it is sustained.

The issue in this case is the nature and extent of the disability of appellant caused by the accident of July 23, 1948, and the amount of unpaid recoverable expenses incurred by him as an incident of his disability. All other essential matters are admitted in the record. Appellant should be awarded $393.29 in addition to the payments of $461.71 made to him by appellees as compensation for his disability and $107.44, the balance of

expenses incurred by him because of the accident, or a total award of $500.73.

The part of the judgment of the district court in favor of the appellant and against the appellees for the amount of $500.73 should be and it is affirmed. The judgment of the district court in all other respects and as to all other matters should be and it is reversed; that all costs accrued in the district court should be and they are taxed to appellees; and that the costs in this court should be and they are taxed to appellant.

AFFIRMED IN PART AND REVERSED IN PART.

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HENRY B. BABSON, APPELLANT, V. VILLAGE OF ULYSSES, A MUNICIPAL CORPORATION, IN BUTLER COUNTY, NEBRASKA, APPELLEE.

52 N. W. 2d 320

Filed March 14, 1952. No. 33112.

1. **Assignments.** Where an executory contract which the parties thereto have the right to rescind or discharge is rescinded by agreement of the parties an assignee of one of the parties of benefits which had not accrued at the time of rescission may not maintain action therefor against the other party in the absence of assumption of liability therefor by such other party.
2. ———. An assignment of a contract or a right flowing therefrom does not create a contractual obligation between the assignee and the other party to the contract in the absence of assumption of the liabilities of the assignor by the assignee.
3. ———. An assignee of the obligation of a contract takes subject to its burdens in the hands of the assignor and in order to recover he must show that the conditions have been performed. He is bound by the terms of the contract to the same extent as the assignor.
4. ———. An assignee of a non-negotiable chose in action ordinarily acquires no greater right than that possessed by his assignor. He stands in the shoes of the assignor and he cannot sue if the assignor could not have maintained the action.

APPEAL from the district court for Butler County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

*J. J. Thomas* and *Charles F. Barth,* for appellant.

*Flansburg & Flansburg,* and *Coufal & Shaw,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

Here are two actions instituted by Henry B. Babson, plaintiff and appellant, against the Village of Ulysses, a municipal corporation, defendant and appellee. The two were consolidated for the purposes of trial and tried as a single action. They will be regarded and treated as one action here.

By the actions plaintiff claims that there is due him from the defendant $100 a month from December 1930 to and including July 1936 with interest at seven percent per annum. The indebtedness is denied by the defendant.

A trial was had to the court at the conclusion of which it was adjudged and decreed that the defendant was not indebted to plaintiff and plaintiff's actions were dismissed. Motions for new trial were duly filed and overruled. From the judgments and the orders overruling the motions for new trial the plaintiff has appealed.

The basis of the litigation is substantially the following: The village of Ulysses entered into an agreement with the Blue River Power Company to supply the village with electric current for all its needs for a period of 20 years commencing April 1, 1920, which energy was to be delivered at the village substation and by the village distributed to its customers. This contract was not actually entered into until September 20, 1921. As a part of the consideration the village agreed to pay to the company $100 a month for 200

months. This part of the consideration was by the parties denominated a "primary charge." It was a part of the rate structure and it appears that its design was to amortize the cost of a transmission line constructed by the company which was necessary to serve the village. The further consideration of the contract was the payment of a specific rate for each kilowatt hour for all electric current used. This was referred to as a "secondary charge." The validity of this contract was not brought into question on the trial.

There was full and complete performance by both parties under the contract until October 17, 1925. On October 17, 1925, all of the stock of the Blue River Power Company was sold to the United Light and Power Company. The stock had been owned by the plaintiff herein. By the terms of the agreement whereby the United Light and Power Company obtained this stock Babson became entitled by assignment to the payment of the $100 a month or "primary charge" from the defendant herein. He became entitled to other properties and interests theretofore belonging to the Blue River Power Company but we deem it unnecessary to describe these interests here since the village was not a party to the agreement and it is not made to appear that it ever prior to this action became informed as to its contents.

It is to be observed that this assignment represented an obligation of the United Light and Power Company to plaintiff and not one of the village to him, and that this was the method adopted by the power company and plaintiff for its liquidation.

The village was notified of assignment of the "primary charge" of $100 a month provided for in the contract. The body of the notification is the following:

"I have been instructed to inform you that at a recent meeting of the Board of Directors of the Blue River Power Company, resolutions were passed, assigning the $100.00 per month, identified as being a primary charge, in our contract with the Village, to H. B. Babson.

"In the future, commencing with the next payment, you will therefore please remit this $100.00 each month, as provided for in the contract, to H. B. Babson, 19th St. & California Avenue, Chicago, Illinois. Payments due for actual current consumed, and stipulated in the contract as being secondary charge, will be payable to the Blue River Power Company, here at Seward, as in the past.

"I kindly ask that you acknowledge receipt of this letter and make payments as per above instructions."

On May 31, 1926, the Nebraska Gas and Electric Company succeeded the United Light and Power Company and became the assignee of the Blue River Power Company contract, and on August 30, 1927, the Iowa-Nebraska Light and Power Company became the assignee thereof.

The village continued to make the monthly payments of $100 each to the plaintiff until December 1930.

On December 2, 1930, the village sold its distributing system to the Iowa-Nebraska Light and Power Company and granted this company a non-exclusive right and franchise for a term of 25 years to build, operate, and maintain an electric power system in the village. The village at this time ceased to be a distributer of electric current. It ceased also to be a purchaser except for a sufficient amount of current to operate its water system. It became such purchaser under the new contract.

Upon the completion of this arrangement the power company and the village regarded the relationship, which by agreement commenced on April 1, 1920, as ended and in consequence the defendant made no further payments to the plaintiff.

The actions here are by the plaintiff to recover from the defendant the monthly payments remaining after December 1930 under the contract between the Blue River Power Company and the village of Ulysses hereinbefore described which became effective as of April

1, 1920, and entered into on September 20, 1921, except the payments for four months which were not due at the time of the commencement of the second action.

Plaintiff by his actions contends that by virtue of his assignment he became entitled to these amounts as they would have come due had the contract and performance thereof not been abandoned by the parties thereto, and to a judgment therefor against the defendant. The judgment of the trial court was a denial of this contention and a dismissal of the actions.

The briefs of plaintiff contain numerous assignments of error and the assertion of many reasons why the judgment should be reversed. We think however that a proper decision herein depends upon the one question of whether or not the plaintiff was entitled to assert a claim against the village under his assignment after the village and the Iowa-Nebraska Light and Power Company ceased to operate under the Blue River Power Company contract.

In the determination of this question it becomes necessary to examine and apply certain facts as well as certain legal principles.

There is no substantial dispute as to controlling facts. The cases come here on the transcript which contains the pleadings and judgment, a stipulation of facts, and the testimony of a single witness. The testimony of this witness was contained in a deposition which was read at the trial.

It is not disclosed by the record that the village ever was notified or had authentic knowledge of the substance or effect of any of the agreements whereby the agreement of the Blue River Power Company or the obligations thereof were transferred to the United Light and Power Company, then to the Nebraska Gas and Electric Company, and then to the Iowa-Nebraska Light and Power Company. The only thing in that connection which came authentically to its knowledge was the information contained in the notification of assignment

of the "primary charge." This notification has been previously quoted at large herein. It will be observed that by this the village was notified only that the "primary charge" of $100 a month was assigned to plaintiff and the village was directed to make payments as they became due to him.

Further the record does not disclose any contractual relationship or privity with reference to this subject matter between plaintiff and defendant. In this connection the record discloses only that the village became informed that through an undisclosed arrangement between plaintiff and the power company plaintiff became entitled to receive a part of the consideration which flowed to the company under the terms of a contract which it had with the village. Whatever right plaintiff had to receive the payments of $100 each flowed from and was the obligation of the agreement or agreements between him and the power companies successively and not from any agreement with the village.

Under this state of facts the defendant contends that it and the company had the right under law to discontinue operation and performance under the contract or in other words to rescind it without liability thereafter on the part of the defendant to the plaintiff on his assignment. It contends that no obligation to pay remained after the parties by mutual action discontinued operation under and performance of the agreement which became effective April 1, 1920.

The contentions of the defendant in this respect must be sustained.

The assignment here was of payments of money to become due under an executory contract which the parties thereto were privileged to rescind or discharge entirely or to modify by agreement thus relieving each from the further obligations thereof in case of rescission or discharge and substituting the new ones in case of modification. Mather v. Butler County, 28 Iowa 253;

Sawyer v. Hawthorne, 167 Iowa 410, 149 N. W. 512; Smith v. Kelley, Maus & Co., 115 Mich. 411, 73 N. W. 385; Vande Stouwe v. Bankers Life Co., 218 Iowa 1182, 254 N. W. 790; Denler & Denler Land Co. v. Eby, 277 Mich. 360, 269 N. W. 203; Enderlien v. Kulaas, 25 N. D. 385, 141 N. W. 511; 13 C. J., Contracts, § 594, p. 588, § 604, p. 589; 17 C. J. S., Contracts, § 373, p. 857, § 387, p. 879.

An assignment of a contract or a right flowing therefrom does not create a contractual obligation between the assignee and the other party to the contract in the absence of assumption of the liabilities of the assignor by the assignee. 4 Am. Jur., Assignments, § 102, p. 310; Tolerton & Stetson Co. v. Anglo-California Bank, 112 Iowa 706, 84 N. W. 930, 50 L. R. A. 777; Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903.

In the present instance there was no assumption by the plaintiff of liabilities of the assignor to the village.

An assignee of the obligation of a contract takes subject to its burdens in the hands of the assignor and in order to recover he must show that the conditions have been performed. He is bound by the terms of the contract to the same extent as the assignor. 4 Am. Jur., Assignments, § 104, p. 311; Florida East Coast Ry. Co. v. Eno, 99 Fla. 887, 128 So. 622, 70 A. L. R. 506; Detroit Postage Stamp Service Co. v. Schermack, 179 Mich. 266, 146 N. W. 144, Ann. Cas. 1915D 287; Pioneer Loan & Land Co. v. Cowden, *supra*.

Here there was an absence of performance by the power company covering the entire period contemplated by the actions.

An assignee of a non-negotiable chose in action ordinarily acquires no greater right than that possessed by his assignor. He stands in the shoes of the assignor. He cannot sue if the assignor could not have maintained an action. Henefin v. Live Stock Nat. Bank, 116 Neb. 331, 217 N. W. 91, 58 A. L. R. 758; First Nat.

Bank v. Rogers, 50 Nev. 325, 258 P. 1024, 58 A. L. R. 902; Florida East Coast Ry. Co. v. Eno, *supra;* Steltzer v. Chicago, M. & St. P. Ry. Co., 156 Iowa 1, 134 N. W. 573, L. R. A. 1915E 1017; 4 Am. Jur., Assignments, § 95, p. 304.

After the agreement was mutually rescinded and performance abandoned no burden of payment remained upon the village. The assignor and its successors surrendered their right to receive or recover the monthly amounts. Consequently the right of the assignee to receive them from the village no longer existed.

It must be said therefore that the mutual rescission of the contract which is brought into question here destroyed the right of plaintiff to recover thereafter from the village on his assignment unless, as plaintiff contends, the pretended rescission was void and of no effect.

The basis of this contention is that the village trustees had no authority or power to alter the terms of or abandon the contract of September 20, 1921. The theory is that authority for the proceedings in this connection was not received through a vote of the electors of the village, which plaintiff insists was a condition precedent to the exercise of such power.

Our attention however has not been called to any statutory provision in existence at the time of the rescission imposing any such requirement. Attention is directed to section 70-604, C. S. Supp., 1931, erroneously referred to as section 70-605, which prohibits the sale, lease, or transfer of an electric light or power plant, distribution system, or transmission lines by a village without a vote of the qualified electors. This provision however did not come into being until one day following this rescission.

Reliance is had also on section 17-508, Comp. St. 1929, now sections 17-901 to 17-904, R. S. 1943. This section in nowise relates to existing contractual relationships. It relates to powers and restrictions thereon to enter into contracts.

It is concluded that the claim of the plaintiff as made that the rescission was void and of no effect is without merit.

The judgments of the district court are affirmed.

AFFIRMED.

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IN RE ESTATE OF ALICE R. BALE, DECEASED. NEBRASKA METHODIST HOSPITAL, A CORPORATION, APPELLEE, V. JOHN MCCLOUD ET AL., APPELLANTS.
52 N. W. 2d 325

Filed March 14, 1952. No. 33115.

1. **Appeal and Error: New Trial.** Affidavits in support of a motion for new trial which are not embodied in a bill of exceptions will not be considered on appeal.
2. **Wills: Trial.** It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict or discharge the jury and render judgment for proponents.

APPEAL from the district court for Nance County: RUSSELL A. ROBINSON, JUDGE. *Affirmed.*

*Lightner & Johnson,* and *Harlan A. Bryant,* for appellants.

*Joseph O. Burger,* and *Brower & Brower,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Nebraska Methodist Hospital, hereinafter called proponent, filed its petition in the county court seeking to probate the alleged last will of Alice R. Bale. There, over objections filed by nephews, nieces, and a sister of

deceased, hereinafter called contestants, the will was admitted to probate. Contestants appealed therefrom to the district court. There a jury was duly empaneled and evidence was adduced by the parties. However, at the close of contestants' evidence the motion of proponent to discharge the jury and enter a judgment or direct a verdict for proponent was sustained, and a judgment was rendered by the trial court ordering the will to be admitted to probate. Contestants' motion and supplemental motion for new trial were overruled and they appealed, assigning substantially that the trial court erred: (1) In withdrawing the cause from the jury and rendering judgment in favor of proponent; and (2) in failing to grant a new trial for newly discovered evidence. We conclude that the assignments should not be sustained.

We turn first to the second assignment which is controlled by State ex rel. Lanham v. Sheets, 119 Neb. 145, 227 N. W. 457, wherein it was specifically held that: "Affidavits in support of a motion for new trial not embodied in a bill of exceptions will not be considered on appeal." In that opinion it was said: "A motion for a new trial was filed by the appellant in the court below, on the ground of newly discovered evidence, and was overruled, upon which ruling the appellant assigns error. We are unable to review the action of the court in that regard because the affidavits upon which such ruling was based have not been preserved by proper bill of exceptions, and we cannot consider them. Omaha Fire Ins. Co. v. Dierks & White, 43 Neb. 473." The situation in the case at bar is identical therewith. Further discussion is not necessary. It is sufficient for us to say that the assignment cannot be reviewed by this court.

The trial court rendered judgment as it did upon the grounds that after proponents had made a prima facie case the contestants adduced no competent evidence which could support a conclusion that there was any failure of lawful execution, testamentary incapacity, or

undue influence. As a matter of fact the record discloses not only that there was no evidence adduced by contestants upon the question of undue influence but also the decree discloses that contestants withdrew that issue in the trial court. It was so conceded in oral argument to this court. That issue therefore requires no further discussion.

We turn then to the questions of: (1) Whether or not proponent made a prima facie case; and (2) whether or not contestants adduced any competent evidence which would make execution and testamentary capacity issues of fact for the jury rather than of law for the court. We conclude that the first should be answered in the affirmative, and the second in the negative.

Without contradiction proponents established execution of the will as provided by law. One subscribing witness was shown to be dead, but the other affirmatively testified at length with regard to its execution, and the signature of deceased on the will was conclusively established not only by such witness but also by another witness and by documentary evidence appearing in the record. Upon such issue contestants adduced no competent evidence whatever.

As a matter of course the rule is that proponent's motion for directed verdict must be treated as an admission of all the competent evidence adduced by contestants, and all proper inferences to be drawn therefrom. In re Estate of Benson, 153 Neb. 824, 46 N. W. 2d 176. In such case, citing other applicable authorities from this jurisdiction, it was held: "It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict."

Other well-established and controlling rules of law

in cases comparable with that at bar will also be found in such case and in In re Estate of Cheney, 78 Neb. 274, 110 N. W. 731; In re Estate of Bose, 136 Neb. 156, 285 N. W. 319; In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203; and In re Estate of Wahl, 151 Neb. 812, 39 N. W. 2d 783. To repeat them here would serve no purpose except to unduly prolong this opinion.

In the light of such rules we have examined the record. In doing so, it is clearly apparent that the evidence adduced by proponent was sufficient to make a prima facie case upon the issue of testamentary capacity, and that contestants adduced no competent evidence which could sustain any reasonable inference that testatrix was incompetent to make a will.

The will was executed on June 8, 1927. Its provisions need not be recited here. It is sufficient for us to say that we find nothing in it which appears to be unjust or unreasonable. In the execution thereof testatrix gave all of her property to proponent in trust for the care and welfare of a brother who predeceased but lived with her during his lifetime, and for the promotion of proponent's charitable purposes thereafter. None of the contestants had contributed to her estate or given her any reason, by conduct or otherwise, to expect that testatrix would give her property to any of them. The proponent had cared for another deceased brother of testatrix during his last illness, and she was not unmindful of that fact. Under the contemporaneous circumstances, conditions and history of events leading up to the execution of the will, we find nothing in its provisions inferring any want of testamentary capacity.

Proponents made their prima facie case upon the issue of testamentary capacity by a subscribing witness, and one who had well and personally known testatrix for many years. The subscribing witness testified substantially that he went with others to her home on June 8, 1927, in response to a request that he act as a subscribing witness. He detailed what took place there at that time

with regard to acts and conversations preliminary to signing the will by testatrix and the subscribing witnesses. In other words, he testified that the will was read to testatrix. She then said that she understood its provisions which were as she wanted them, and it was then duly executed. Such witness did not give general answers upon the question of her mental capacity, but answered specific questions which contained the necessary standards as to the quality of mind necessary to constitute testamentary capacity, to wit: That testatrix understood the nature of her acts, the extent of her property and the proposed disposition of it, and knew the natural objects of her bounty.

Another witness, a hardware dealer, testified that he had known testatrix for many years, beginning in 1923. She was a customer in his store from about that time until in 1940 or 1941, and at or about the date of the will and subsequently testatrix made purchases from him, well knowing exactly what she wanted, and giving checks in payment therefor. The checks appear in the record, bearing her unquestioned signatures comparable with that on the will. Such witness likewise testified, as did the subscribing witness, with regard to her testamentary capacity to execute a will.

On the other hand, all four of contestants' witnesses simply testified that in their opinion testatrix was "not of sound mind" or "not really of sound mind" or "I can't say she was slipping but then after she got most of the property to look after— * * * She was not (of sound mind)." It appears, however, that not one question asked, nor any answer of such witnesses, to all of which proponent appropriately objected and moved to strike, even intimated much less stated any standard of mental quality upon which testamentary incapacity could be predicated. In other words, there was no competent evidence adduced by contestants to negative that testatrix: (1) Understood the nature of her acts; or (2) knew the extent of her property; or (3) under-

stood the proposed disposition of it; or (4) knew the natural objects of her bounty. Thus the issue of testamentary capacity became a question of law for the court.

There was some evidence adduced that testatrix was not neat, did not dress in the latest fashion but made her own clothes, was a little eccentric or old-fashioned, and that she was a woman of little education who probably could not read or write except to sign her name. However, as heretofore observed, that was not sufficient to raise any inference that she did not possess testamentary capacity.

There was also some evidence that testatrix possessed quite a large estate in 1927 when the will was executed, but that it had dwindled to considerably less in 1950 when she died. What became of it during the 23 ensuing years was not shown. In that connection there was no evidence that such a situation resulted from mental incompetency. No inference could be drawn therefrom that she lacked testamentary capacity. For aught we know, it was used for her own support and comfort. We conclude that there was no competent evidence adduced by contestants to overcome the prima facie case made by proponent, and that the trial court properly withdrew the cause from the jury and rendered a judgment for proponent.

For the reasons heretofore stated, the judgment should be and hereby is affirmed.

AFFIRMED.

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ADOLPH BRCHAN ET AL., APPELLANTS, V. THE CRETE MILLS, A CORPORATION, ET AL., APPELLEES.
52 N. W. 2d 333

Filed March 14, 1952. No. 33121.

1. **Injunctions: Actions.** It is a general rule that several independent tort-feasors may be joined in an action in equity for an

injunction when the petition states but one cause of action against the joint tort-feasors.

2. **Injunctions: Nuisances.** An action for an injunction to restrain or abate a continuing nuisance may be maintained by any person who suffers damage or injury thereby. For such injury injunction is a proper remedy, and an injured party may recover such damages in the same action as he may have sustained by such wrongful act.
3. **Equity.** It is a well-settled principle of equity jurisprudence that, where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.

APPEAL from the district court for Saline County: STANLEY BARTOS, JUDGE. *Reversed and remanded.*

*Frederick J. Patz* and *Ralph H. Gillan,* for appellants.

*Joseph Ach, Dredla & Dredla, Van Pelt, Marti & O'Gara, J. W. Weingarten, Walter P. Loomis,* and *John E. Mekota,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This action was brought in the district court for Saline County by Adolph Brchan and Ellis Brchan, plaintiffs, owners of certain real estate and personal property, against The Crete Mills, a corporation, and the Chicago, Burlington and Quincy Railroad Company, a corporation, defendants, to enjoin the defendants from unlawful and negligent interference with the waters of the Big Blue River and Walnut Creek by separate structures maintained by them, to have the same modified or abated, and also for damages sustained by the plaintiffs to their real and personal property. The defendants each, separately and specifically, demurred to the plaintiffs' petition. The trial court sustained the special demurrers of the defendants, holding that The Crete Mills and the Chicago, Burlington and Quincy Railroad Company, corporations, were improperly joined

as parties defendant; and that there was a misjoinder of causes of action, a defect of parties defendant, and a misjoinder of parties defendant, there being no joint or common liability of said two defendants. The plaintiffs elected not to file and docket a separate action against each defendant but to stand on their petition, and the action was accordingly dismissed by the trial court. From this order the plaintiffs appeal.

For convenience Adolph Brchan and Ellis Brchan, husband and wife, will hereafter be referred to as plaintiffs; The Crete Mills, a corporation, defendant, as the Crete Mills; and the Chicago, Burlington and Quincy Railroad Company, a corporation, defendant, as the railroad. In the plaintiffs' petition the Big Blue River is referred to, and for convenience we will refer to it as the river, and Walnut Creek, as described in the plaintiffs' petition, will be referred to as the creek.

In view of the trial court's order in sustaining the separate special demurrers of the Crete Mills and the railroad, we are required to examine and analyze plaintiffs' petition to determine whether or not the trial court erred.

The plaintiffs' petition is rather lengthy. We set forth a resume of it deemed pertinent to a determination of this appeal.

The plaintiffs' petition alleged that the plaintiffs own and reside on real estate situated in Crete, Nebraska, and also own personal property which they use in connection with the real estate. Crete Mills owns a dam. Extending across the river adjacent to the dam and extending several hundred feet in a northwesterly direction from the dam is a system of artificial dikes owned by the Crete Mills, used for the purpose of creating an artificial pond to prevent the river from forming a new channel to the west of the dam. The dikes have been maintained at a height of 9 feet higher than the top of the dam, which height is in excess of that authorized by law. The dikes and the dam obstruct the natural

flow of water in the river, and raise the level of the water above the dam. From time to time, due to melting snow and ice, or heavy rains in the area drained by the Big Blue River, the amount of water carried by the river is greatly increased, creating the danger of the river overflowing its banks and flooding the property of the real estate owners bordered on the river. The dikes and dam increase the danger of flooding said real estate, particularly that owned by the plaintiffs, by impeding, stopping, obstructing, and slowing down the flow of water in the river, all of which is known to the Crete Mills. The Crete Mills carelessly and negligently failed and neglected to guard against the danger, or to provide for the flow of such water over and through said dikes and dam in such a manner as to prevent flooding plaintiffs' property. On the contrary, the Crete Mills built, repaired, maintained, and raised said dikes so as to prevent the flow of any water over or through the dikes.

The petition further alleged that the railroad owns a railroad track and embankment running in a southwesterly direction through the city of Crete, and lying to the south of the real estate owned by plaintiffs; that the embankment has been built up and maintained by the railroad to a height of several feet above the surrounding land and is, in effect, a dike preventing the flow of any water from the land to the north thereof to the land south thereof, except through a small culvert which is inadequate to carry the flood waters from the river that may, from time to time, flow over and upon the land to the north of the railroad tracks; and that the embankment constitutes an obstruction of the flood channel of the river and increases the danger of flooding plaintiffs' real estate. The railroad carelessly and negligently failed and neglected to provide for adequate drainage under and through its embankment. That on or about March 8, 1949, the amount of water in the Big Blue River was greatly increased due

to the melting of ice and snow, and rainfall in the area drained by the river. That said additional water would have been carried within the banks of the river, had the river not been obstructed by the dikes and dam. No flooding of plaintiffs' property would have resulted from the increased flow of water. That because of said obstructions, the level of the water above the dikes and dam was greatly raised, causing the water of the river to flow over and out of its banks; and that because of the railroad embankment the water, after overflowing the banks of the river, could not escape to the south, and the height of the flood was greatly increased. That no flooding of plaintiffs' property would have resulted from the increased flow of water in the river except for the dikes and dam of the Crete Mill. That except for the railroad embankment the flood water would not have raised to a height sufficient to flood plaintiffs' property. That because of the obstructions placed across the river and its flood channel by the Crete Mills and the embankment by the railroad, the real estate of the plaintiffs was flooded to their damage in the sum of $1,130.

Plaintiffs' petition further alleged that north of the plaintiffs' real estate flows Walnut Creek which drains into the river above the dam belonging to the Crete Mills. That due to the maintenance of the dam and its unlawful height, the water level of the river at the mouth of the creek has been raised to such an extent that the flow of the water from the creek into the river has been impeded, and the mouth of the creek is in the backwater of the dam. That as a result, much silt has been deposited in the bed of the creek for a considerable distance back from its mouth. That at times of high water the flow of water from the creek into the river is greatly impeded and obstructed by the silt and the water level of the river at the mouth of the creek thereby causing the water of the creek to flow over and out of its banks and over and upon the real estate

of the plaintiffs. That the natural drainage of flood waters going over the banks of the creek is to the south and over and past the railroad embankment, then to the river. That the railroad embankment obstructs the flood channel of the creek. That the drainage under the embankment is inadequate to provide for the flow of flood waters from the creek which may flow over and upon the land north of the embankment. That the railroad has carelessly and negligently failed and neglected to provide adequate drainage under and through its embankment.

The petition further alleged that on or about May 8, 1950, heavy rains occurred in the area drained by the creek greatly increasing the flow of water therein. That because of matters heretofore alleged, the flow of water so increased went over and out of the banks of the creek. That the railroad embankment obstructed the flow of the flood waters and caused the same to back on and over plaintiffs' real estate. That the flooding of plaintiffs' real estate was the direct result of the obstructions placed in the river by the Crete Mills and in the flood channel of the creek by the railroad, to the plaintiffs' damage in the sum of $1,470.

The petition further alleged that on July 10, 1950, the amount of water in the river was greatly increased due to heavy rainfall in the area drained by the river. That the additional water would have been carried within the banks of the river had the river not been obstructed by said dikes and dam, and no flooding of the plaintiffs' property would have resulted from the increased flow of water. That because of said obstructions the level of the water above the dikes and dam was greatly raised causing the water from the river to flow over and out of its banks. That because of the railroad embankment the water, after overflowing the banks of the river, could not escape to the south, and the height of the flood was greatly increased. That no flooding would have resulted from the increased flow of water in the

river except for the dikes and dam of the Crete Mills. That except for the railroad embankment, the flood waters would not have reached the height sufficient to flood plaintiffs' property. That because of the obstructions placed across the river and its flood channel by the Crete Mills and the railroad, the real estate of plaintiffs was flooded to their damage in the sum of $1,190. That the maintenance of the dam and dikes by the Crete Mills, and of the embankment by the railroad, constitutes a nuisance which will be a continuing nuisance. That plaintiffs' property has been flooded on three occasions since March 8, 1949. That said nuisance and the flooding caused thereby have permanently decreased the value of the plaintiffs' real estate in the amount of $2,000, and also decreased the rental value thereof in the amount of $15 a month since March 8, 1949, or $360 to the date of the filing of this petition.

The petition further alleged that unless restrained by this court the defendants will continue the maintenance of the aforesaid obstructions of the river and the creek and their flood channels, and plaintiffs' real estate will be periodically flooded by reason of the said obstructions. That plaintiffs have been and will be, by reason of the said obstructions, irreparably injured, and have no adequate remedy at law. That plaintiffs are entitled to a permanent injunction requiring defendants to remove said obstructions.

The plaintiffs' prayer is for (1) an order permanently enjoining the Crete Mills from operating and maintaining said dam and dikes in such manner as to obstruct the natural flow of the waters in the river and creek to the extent that the waters from said streams shall, in times of high water, be diverted over and upon plaintiffs' property, and to require the Crete Mills to remove said dam and dikes or lower them to a level to be determined by the court, so that said dam and dikes will not obstruct the natural flow of waters in said streams in such manner as to flood plaintiffs' property; (2) for

an order permanently enjoining the railroad company from maintaining its embankment so as to prevent the flow of water under the same, and to require it to provide drainage sufficient for the uninterrupted flow of waters escaped from the river and creek; and (3) for a judgment against the defendants in the sum of $6,150 and costs of this action, and for such other and further relief as to the court may seem just and equitable in the premises.

The plaintiffs assign as error the judgment of the trial court in sustaining the special demurrer of the Crete Mills, sustaining the special demurrer of the Chicago, Burlington and Quincy Railroad Company, and in dismissing the plaintiffs' petition.

The plaintiffs concede the following: In this case the obstructions maintained by each of the defendants are entirely separate and distinct from each other and there is no concert of action between the two defendants in the maintenance of these obstructions. Under these circumstances there is a great deal of law to the effect that such obstructors are not jointly liable for damages resulting from the maintenance of such obstructions, but that each is liable only for the damages traceable to the obstruction maintained by him. The rule is also quite clear that persons severally, but not jointly liable, may not be joined in a suit at law for damages. Since the plaintiffs have not alleged facts showing joint liability, these defendants could not be joined in an action at law for damages.

This brings us to the question, can both defendants be joined in a suit in equity for an injunction against the maintenance of their separate obstructions?

In Norton v. Colusa Parrot Mining & Smelting Co., 167 F. 202, it is held: "* * * it is an established rule of equity that where several persons are alleged to have contributed, and are continuing to contribute, to the same general nuisance, on account of which complain-

ants suffer, all such contributing persons may be joined as defendants."

In Johnson v. City of Fairmont, 188 Minn. 451, 247 N. W. 572, the court observed that there seemed to be ample authority permitting the prosecution of an action in equity against independent tort-feasors for an injunction restraining them from doing separate and independent acts the consequences of which constitute a nuisance. See, also, 66 C. J. S., Nuisances, § 124, p. 899; 67 C. J. S., Parties, § 39, p. 960; Goldsmith & Powell v. State (Tex. Civ. App.), 159 S. W. 2d 534; Annotation, 91 A. L. R. 765.

In the annotation to 9 A. L. R. 952, appears the following: "It is a general rule that several independent tort-feasors may be joined in an action in equity for an injunction." Cases are cited in support thereof.

We conclude that defendants may be joined in a suit in equity for an injunction against the maintenance of their separate obstructions.

Defendants make reference to § 25-701, R. R. S. 1943, which provides: "The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in any of the following classes: * * *." The classes of cases are unnecessary to set forth.

Section 25-702, R. R. S. 1943, provides: "The causes of action so united must affect all the parties to the action, and not require different places of trial."

It is the defendants' contention that plaintiffs' petition states more than one cause of action against each of the defendants for the following reasons: Three separate floods are set forth in the petition and the damage caused by each of the floods is set forth in detail; the unlawful acts of each of the defendants, if any, are separate and distinct; the unlawful act of the defendant Crete Mills is alleged to be the maintaining of a dam and dikes on the Big Blue River, and the petition con-

tains no allegation that the railroad was responsible for the maintaining of the said dam and dikes; the unlawful act charged to the railroad is the maintaining of its embankment, and the petition contains no allegation that Crete Mills is responsible for maintaining the railroad embankment.

In this connection the defendants rely on Sickler v. City of Broken Bow, 143 Neb. 542, 10 N. W. 2d 462. This case holds that causes of action cannot be joined unless each cause affects all the parties. The case involved the attempted joinder of two causes of action which were clearly separate and distinct. One cause of action was against the school district for creating a nuisance in the construction of an athletic field adjoining the plaintiff's property. The city had no interest in this nuisance. In the other cause, the city was charged with the wrongful appropriation of the plaintiff's property. The school district had no part in this appropriation. It is apparent that two causes of action were stated, and they could not be joined.

The defendants assert that the allegations of the petition disclose the essential character of it to be an action in law. This contention is based on the proposition that the petition alleges a specific amount of loss for each of the three floods set forth therein, in addition, alleges a depreciation of the value of the plaintiffs' real estate and loss of rental in a specific amount, and prays for a money judgment of $6,150. The following authority is applicable.

It is held in Mills v. Heckendorn, 135 Neb. 294, 281 N. W. 49: "The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief."

Applying the above rule to the plaintiffs' petition, we believe it contains sufficient allegations to disclose

an action in equity charging the defendants with creating a nuisance, which is a continuing nuisance, and alleging facts upon which the nuisance may be abated if the proof so warrants. The allegations pertaining to damages are incidental to the main relief sought.

In the instant case the structures of the defendants operated at the same time to cause the same damage, the flooding of the plaintiffs' property. During each of the floods complained of, both of the obstructions operated at the same time to hold the waters back upon the plaintiffs' property.

There is no denial but that section 25-702, R. R. S. 1943, also governs equity cases, and that causes of action cannot be joined unless each cause affects all parties. In such event section 25-702, R. R. S. 1943, Sickler v. City of Broken Bow, *supra,* and cases cited by the defendants to the same effect, would be applicable, but not so when plaintiffs' petition states but one cause of action.

This brings us to the question whether, in such suit to enjoin the nuisance, damages suffered by the plaintiff on account of such nuisance may be included in the equitable action. The cases are not unanimous on this point. Norton v. Colusa Parrot Mining & Smelting Co., *supra.* Some cases hold to the position that the collection of damages was not an actionable matter, and that an adequate remedy at law exists for the collection of damages. They further held that the defendant was entitled to a jury trial on the question of damages.

In Weingand v. City of North Platte, 108 Neb. 17, 187 N. W. 90, the court said: "An action for an injunction to restrain or abate a continuing nuisance may be maintained by any person who suffers damage or injury thereby, and he may in the same action be allowed to recover for any past or present damage which he has sustained by reason of the nuisance." See, also, Graham v. Pantel Realty Co., 114 Neb. 397, 207 N. W.

680; Siebold v. Whipple, 143 Neb. 167, 9 N. W. 2d 154; Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387.

In the case of Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108, in a former action, a suit to obtain an injunction against the continuance of a nuisance, there was no attempt made by the plaintiff to recover damages. The court refused to grant the injunction. The plaintiffs brought this action to recover damages. The court held the matter to be res adjudicata, saying: "On the facts pleaded in the former action the plaintiffs had available two remedies, namely, injunction and damages, provided, of course, that they sustained the allegations of fact. They sought only injunction. They failed to sustain their allegations of fact, hence, there having been no mistake of remedy, under the doctrine of res adjudicata they are estopped to assert the same facts in support of an additional and concurrent remedy which is dependent solely upon those facts."

It appears from the foregoing-cited Nebraska cases that this jurisdiction has given approval to the proposition in a suit to enjoin a nuisance, damages suffered by the plaintiff on account of such nuisance may be included in the equitable action. This being an action in equity, the main relief sought is the abatement of the nuisance. The only damages that could be recovered would be the damages occurring as a result of the nuisance, if such be proven. This is based on the following rule: "It is a well-settled principle of equity jurisprudence that, where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation." Schreiner v. Witte, 143 Neb. 109, 8 N. W. 2d 831. See, also, Security Investment Co. v. Golz, 151 Neb. 172, 36 N. W. 2d 862; Herrin v. Johnson Cashway Lbr. Co., 153 Neb. 693, 46 N. W. 2d 111.

Among numerous decisions from foreign jurisdictions that specifically adopt the rule are the following:

In the case of Mitchell Realty Co. v. City of West Allis, 184 Wis. 352, 199 N. W. 390, 35 A. L. R. 396, a suit brought against eight defendants to abate a nuisance caused by the pollution of a stream, and recover damages, upon motion of the defendants, allegations as to damages were stricken. The court said: "Under the doctrine well established by this court, if a court of equity takes jurisdiction of a matter it will retain jurisdiction for the purpose of doing complete justice between the parties, and will, in a proper case, not only extend its equitable remedy but will also permit the recovery of damages." The court overruled the order of the trial court in striking the plaintiff's allegations as to damages, holding: "Had the action proceeded, the plaintiffs could have obtained their equitable remedy for the abatement of the nuisance, and, upon the determination by the court of the proportionate share of the damage caused by each of the defendants, were entitled to judgment for such amounts, thus disposing of the entire litigation in one action. To accomplish such a result is one of the principal functions of a court of equity." See, also, McMechen v. Hitchman-Glendale Consolidated Coal Co., 88 W. Va. 633, 107 S. E. 480; Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735; Stoner v. Mau, 11 Wyo. 366, 72 P. 193; Carthew v. City of Platteville, 157 Wis. 322, 147 N. W. 375; Karns v. Allen, 135 Wis. 48, 115 N. W. 357, 15 Ann. Cas. 543.

With reference also to the recovery of damages, damages to personal property located on the real estate may also be recovered in this equity action. See, Graham v. Pantel Realty Co., *supra;* Weingand v. City of North Platte, *supra;* Stoner v. Mau, *supra.*

It is apparent that damages recoverable in an action of this kind are not limited to damages to the real estate alone, but include damages to personal property located thereon.

For the reasons given herein, the special demurrers of the defendants should have been overruled, and the

trial court's judgment in sustaining the special demurrers of the defendants is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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FRANK MEDELMAN AND LEO SOKOL, APPELLANTS, V. STANTON-PILGER DRAINAGE DISTRICT, APPELLEE.
52 N. W. 2d 328

Filed March 14, 1952. No. 33122.

1. **Eminent Domain.** When lands are taken in a condemnation proceeding by reason of the power of eminent domain the owners thereof are entitled to recover full compensation for the lands actually taken and for damages to the remainder thereof such an amount as is equivalent to the diminution of the fair market value thereof resulting therefrom.
2. ———. The market value of property includes its value for any reasonable use to which it may be adaptable.
3. **Evidence.** Generally, either lay or expert witnesses may be used to testify as to the value of a tract of land taken or the value of the remainder thereof immediately before and immediately after the taking if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their testimony being for the jury.
4. ———. Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony.

APPEAL from the district court for Stanton County: FAY H. POLLOCK, JUDGE. *Affirmed.*

*Deutsch & Jewell,* for appellants.

*T. L. Grady,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is a condemnation proceeding instituted in the county court of Stanton County on June 8, 1950, by the

Stanton-Pilger Drainage District to obtain a 200-foot right-of-way across the lands of Frank Medelman and Leo Sokol, doing business as the Elkhorn Construction Company, for the purpose of constructing a new pilot channel to straighten the course of the Elkhorn River. Appeal was taken from the appraiser's award to the district court for Stanton County. In the district court trial was had to a jury. The sole issue tried by the jury was to determine the amount of damages which the landowners had sustained by the taking. The jury returned a verdict for $500 on which the trial court entered judgment. Their motion for new trial having been overruled, the landowners appealed.

Appellants owned approximately 97 acres of land in the south half of Section 3, Township 23 North, Range 3 East of the 6th P. M., in Stanton County, Nebraska, at the time this proceeding was instituted. They acquired this land by warranty deed dated November 8, 1947, and paid for it the sum of $5,000. The appellee's right-of-way passes across the north part of the land.

In this type of action we have held: "As damages the plaintiffs are entitled to recover full compensation for the land actually taken and for such damages to the remainder thereof as are equivalent to the diminution of the fair market value thereof." Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168.

In this respect we have said: "The market value of property includes its value for any reasonable use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which made up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation. The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted? The correct rule is as stated in Alloway

v. Nashville, 88 Tenn. 510, 13 S. W. 123: '"* * * witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. But when all the facts and circumstances have been shown, the question at last is, What is it worth in the market?" Lewis, Eminent Domain, sec. 479.'" Langdon v. Loup River Public Power Dist., *supra.*

As stated in 18 Am. Jur., Eminent Domain, § 242, p. 878: "When the land taken has valuable deposits of minerals, or contains sand, gravel, peat, or other materials of value, or is covered with growing crops, or trees capable of being converted into lumber, these circumstances may be considered so far as they affect the market value of the land; but part of the realty cannot be separately valued for its materials, as an item additional to the value of the land for the purpose of sale." See 29 C. J. S., Eminent Domain, § 174, p. 1043.

Under this principle appellants could introduce evidence to show that the lands involved contained gravel deposits of such character that they were adaptable to commercial development and show the fair market value of the lands in view thereof. This they did.

Appellants complain that the trial court erred by permitting appellee's witnesses to testify as to the fair market value of the lands actually taken for a new pilot channel and the damage resulting therefrom to the remainder because they did not show a knowledge of all the uses and purposes to which the property could be put.

Appellee's witnesses were qualified to and did testify as to the value of the land taken and damages resulting

therefrom based on its use for pasture and agricultural purposes but none were qualified as experts in the field of gravel and the commercial production thereof nor did they testify concerning its value if reasonably adaptable thereto, although they did testify as to observing what had been taken from some of the test holes and also what had been stockpiled in 1948.

"Minerals in place are matters concerning which the ordinary person probably knows little as to their value, and their value is usually a matter for expert testimony to explain to the jury, because not capable of being understood by the average person." Thorn v. Dunn, (Tex. Civ. App.), 94 S. W. 2d 1229.

Whether or not this rule would apply to gravel, which is here involved, we need not decide.

We said in Langdon v. Loup River Public Power Dist., *supra*: "The question of the qualification of witnesses to testify as to the value of the premises in question is raised by the rulings on objections to the testimony of certain witnesses. In Republican V. R. Co. v. Arnold, 13 Neb. 485, 14 N. W. 478, we stated: 'Where persons are shown to be familiar with the value of a particular piece of land, across which a railroad has been built, they may be permitted to testify as to the value of such tract immediately before the location of the road, and to the value thereof immediately afterwards.' And in Wahlgren v. Loup River Public Power District, *supra*, we stated: '* * * where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. Republican V. R. Co. v. Arnold, 13 Neb. 485, 14 N. W. 478; Blakeley v. Chicago, K. & N. R. Co., 25 Neb. 207, 40 N. W. 956; Burlington & M. R. R. Co. v. White, 28 Neb. 166, 44 N. W. 95; Chicago, R. I. & P. Ry. Co. v. Buel, 56 Neb. 205, 76 N. W. 571.' And as stated in 20 Am. Jur. 754, sec. 897: 'Ordinarily, property owners who have lived for some time in the vi-

cinity and know the property are qualified to testify to its value.' Either lay or expert witnesses may be used if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, the weight and credibility being for the jury."

Appellants introduced evidence to the effect that the lands taken contained a gravel bed adaptable to being developed for the profitable production of commercial gravel and the witness considered that fact in placing his value thereon. On the other hand appellee introduced evidence as to the value of the lands based on its use for pasture and agricultural purposes only. It is not necessary that a witness, testifying as to the fair market value of lands, be familiar with, have knowledge of, and take into consideration every possible use to which the owner of the lands being taken may think they are adaptable. What a witness considers in coming to his conclusion as to the value thereof can be brought out in cross-examination. However, the owner may show all of the reasonable uses to which he thinks the lands are adaptable and what the lands are worth in view thereof. If, as a result thereof, there is conflict in whether the lands are adaptable for a certain use it is then up to the jury to determine which of the two views they believe.

That was the situation here. There is much evidence in the record to show that it was not practical to develop these lands for the production of commercial gravel, such as the unprofitable operations of appellants in 1948 when they lost considerable money in trying to do so, the observations made by witnesses of appellee as to the material taken from the test holes and what was in the stockpile, and the removal by appellants in 1949, before this action was started, of most of the equipment which they had placed there in 1948.

Nor is the fact that appellee did not call a witness expert in the field of gravel and its production here con-

trolling. As quoted in Langdon v. Loup River Public Power Dist., *supra*: "As stated in Horst v. Lewis, 71 Neb. 370, 103 N. W. 460: 'Expert evidence is permitted where the facts under investigation are such that the witness is supposed, from his experience, skill and study, to have peculiar knowledge upon the subject of inquiry, which jurors generally do not possess.' However, '* * * the weight to be given to such expert testimony is ordinarily a question for the jury. * * * Jurors are not bound by the testimony of experts; their evidence is to be weighed as that of all other witnesses.' McNaught v. New York Life Ins. Co., 143 Neb. 220, 12 N. W. 2d 108."

"An authoritative text states the rule as follows: 'Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are generally regarded as purely advisory in character; the jury may place whatever weight they choose upon such testimony and may reject it, if they find that it is inconsistent with the facts in the case or otherwise unreasonable. * * * Opinion testimony as to value is not conclusive; when uncontradicted, it may be regarded as sufficient proof, but even in such case the jury may exercise their independent judgment.' 20 Am. Jur., Evidence, § 1208, p. 1060." Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396.

And as stated in Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603:

"In this respect it is appellants' thought that the evidence of their two experts was conclusive on this factual issue as a matter of law. While it was a subject to which expert testimony was relevant it is not a subject which lends itself exclusively to that type of testimony. Lay witnesses could testify to what they observed and from all the testimony it was for the jury to determine the ultimate question.

"Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony. See 32 C. J. S., Evidence,

§ 569, p. 390; Morse v. Chicago, B. & Q. Ry. Co., 81 Neb. 745, 116 N. W. 859."

Appellants call attention to the fact that appellee failed to call a party by the name of O'Brien who made a test hole on the premises shortly before the trial in the district court. In regard thereto they refer to the following principle: "The unexplained failure of a party to call or examine an available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party." 31 C. J. S., Evidence, § 156, p. 853.

The failure to call this party, what the party had done in regard to assisting in making a test hole, his qualifications, and all other matters relating thereto were fully presented to the jury.

The extent of a party's right to invoke his opponent's failure to call an available witness is to impair the value of the opponent's proof and to give greater credence to his evidence on any issue on which it is shown that the witness might have had knowledge. However, the probative force of any inference arising therefrom is for the triers of the facts, which in this case was the jury.

Appellants contend the court erred in excluding the evidence of Frank Medelman as to what he would have done as to putting in a full gravel outfit on this land if the drainage district had not gone through it.

"Owner's intended use. In some jurisdictions evidence of what the owner intended to do with the land may be considered as one of the facts in estimating the compensation due him, but it is generally held that the owner is not entitled to enhanced damages because he is prevented from carrying out a particular scheme of improvement." 29 C. J. S., Eminent Domain, § 160, p. 1028.

We think the offered testimony had no relation to the issue before the jury, which was the reasonable

uses to which the land was adaptable. It is also speculative.

Appellants finally contend the verdict of the jury is grossly inadequate and contrary to and not sustained by the evidence. It is true the jury did not exactly follow the evidence of either appellee's or appellants' witnesses in fixing the amount of the recovery. But there is evidence in the record on which they could base their verdict, including their view of the premises.

As early as Northeastern Nebraska R. R. Co. v. Frazier, 25 Neb. 42, 40 N. W. 604, this court made the observation that: "The principal question ordinarily is the amount of damages sustained. This question is to be determined from the testimony of experts, that is, persons familiar with the value of the land, and this may include farmers and others. The observation of this court, from the cases which have been before us, is, that juries ordinarily do not adopt the highest or lowest estimates of witnesses, but seem to have endeavored to bring in just verdicts. Nor did the jury in this case adopt the highest estimates of the witnesses."

Therein the court went on to hold: "The question of the amount of damages sustained by a land owner for a right of way condemned across his land is peculiarly of a local nature, proper to be determined by a jury of the county, and the supreme court ordinarily will not vacate or modify the verdict, if it is based upon the testimony in the case." This holding has often been approved by this court. See, Langdon v. Loup River Public Power Dist., *supra;* Kennedy v. Department of Roads and Irrigation, 150 Neb. 727, 35 N. W. 2d 781.

"It is the province of the jury to harmonize the testimony in so far as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses. Wahlgren v. Loup River Public Power District, 139 Neb. 489, 297 N. W. 833." Langdon v. Loup River Public Power Dist., *supra.*

"'* * * when the evidence is conflicting the verdict

of the jury will not be set aside, unless it is shown to be clearly wrong.' Grimm v. Elkhorn Valley Drainage District, 98 Neb. 260, 152 N. W. 374." Langdon v. Loup River Public Power Dist., *supra*.

While in conflict, there is competent evidence in the record to sustain the jury's verdict and we cannot say that it is clearly wrong.

In view of the foregoing, we affirm the judgment of the district court.

AFFIRMED.

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FERN GARNETT PARKER, APPELLANT, V. IRVEN C. PARKER, APPELLEE.
51 N. W. 2d 756

Filed March 21, 1952. No. 33029.

SUPPLEMENTAL OPINION

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. See 155 Neb. 325, 51 N. W. 2d 753, for original opinion. *Motion for rehearing overruled.*

*Crosby & Crosby,* for appellant.

*Beatty, Clarke, Murphy & Morgan,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

It appearing to the court that some controversy might arise between the parties with reference to interest on the judgment as modified in favor of the appellant, we conclude that the judgment of the appellant shall draw interest at the legal rate 60 days from the date of the issuance of the mandate in this cause. With this clarification, the motion for rehearing is overruled.

MOTION FOR REHEARING OVERRULED.

BERNARD C. POPPE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
52 N. W. 2d 422

Filed March 21, 1952. No. 33062.

1. **Appeal and Error: Criminal Law.** This court will not interfere with a verdict of guilty in a criminal case which is based upon conflicting evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Courts: Criminal Law.** The rule of practice and procedure in criminal cases promulgated under the authority of Article V, section 25, of the Constitution of Nebraska set forth in Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462, is adhered to.
3. **Constitutional Law: Automobiles.** Section 39-727, R. S. Supp., 1949, held not violative of Article I, sections 6, 11, and 12, of the Constitution of Nebraska, and Article III, section 2, and amendments V, VI, and XIV, of the Constitution of the United States.
4. **Criminal Law.** When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute.
5. **Criminal Law: Automobiles.** Evidence as to the identification of the defendant as the same person charged with two previous offenses under section 39-727, R. S. Supp., 1949, and convicted, examined and held to be sufficient to identify the defendant as the same person.

ERROR to the district court for Sarpy County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

*William L. Walker* and *Earl Ludlam,* for appellant.

*Clarence S. Beck,* Attorney General, and *Dean G. Kratz,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

Plaintiff in error Bernard C. Poppe, defendant in the district court for Sarpy County, brings this error proceeding seeking reversal of his conviction of unlawfully operating a motor vehicle upon the public highways of

this state while under the influence of alcoholic liquor. The information also contained charges of two previous convictions of a like offense. His motion for new trial having been overruled, the defendant was sentenced to serve not less than 1 year nor more than 18 months in the State Reformatory for men. The trial court also ordered the defendant not to drive any motor vehicle for a period of 1 year from the date of his final discharge from the State Reformatory for men.

We will refer to the plaintiff in error as the defendant.

The defendant assigns as error that the verdict of the jury is not sustained by sufficient evidence.

The evidence adduced by the State, briefly summarized, is as follows: About 9:15 p. m., on February 13, 1951, patrolman Whitney of the Nebraska Safety Patrol was patrolling Federal Highway No. 6 from Lincoln to Gretna. The night was clear and cold, and the pavement was dry. While he was in the cruiser car a little east of Linoma Beach the defendant's car passed him at a speed of 50 miles an hour. The defendant's car was weaving back and forth across the pavement. The patrolman fell in behind the defendant's car at a distance of about two blocks and continued northeast on highway No. 6 at a speed of 65 miles an hour. The defendant's car continued to weave back and forth and sometimes would be completely across the center line of the pavement. After following the defendant for a mile, the patrolman attempted to speed up and stop him, at which time the defendant speeded up his car and started to pull away from the patrolman. The two cars continued on northeast to a hill which is between two and three miles east of Linoma Beach, and started up the hill. They met a truck, and defendant slowed his vehicle down to approximately 35 miles an hour, and was at that time on his own side of the road. After being clear of the truck, the defendant speeded up and reached the top of the hill traveling very fast. The patrolman was unable to stop him.

They proceeded on, and passed the junction of highways No. 85 and No. 6, and proceeded straight north. Defendant was traveling at a rate of speed of from 85 to 90 miles an hour. At that time the defendant's car was swerving on the highway. It would swerve completely across the highway and then sharply back to its right side of the highway. This occurred several times between that point and the southwest corner of Gretna, at which time the defendant came up behind three cars which were traveling northeast in the curve proceeding to Gretna. The defendant passed these cars at a high rate of speed. He was unable to see around this curve to tell if any traffic was coming. After defendant got clear around the curve, the patrolman could see the road ahead, and he speeded up the cruiser car. The defendant had slowed down, turned in at the east side of the Home Oil Company, and stopped. As he came to a stop the patrolman pulled up on the right side of the defendant's car and stopped. The patrolman opened the door of the defendant's car and smelled a strong odor of alcoholic liquor. The defendant stepped out of his car holding on to it. He was unsteady on his feet, his face was flushed, and his eyes were watery and bloodshot. He was not clear in his speech and stuttered considerably. His clothes were disheveled and his hair was mussed. As he walked to the patrol car his feet were spread far apart. He staggered and his body lurched forward. On the way to Papillion, the county seat of Sarpy County, the defendant would fall asleep, wake up, straighten up, then fall asleep again. Upon the arrival at Papillion they met another patrolman and the deputy sheriff of Sarpy County. These two officers testified to the defendant's condition substantially to the same effect as the arresting patrolman. All of these witnesses gave as their opinion that the defendant was under the influence of intoxicating liquor. On the inside of the defendant's car was found two six-pack

cartons of beer, and another carton with two cans of beer gone.

The defendant testified that he is 29 years old, unmarried, and lives with his parents. He was employed as an inside laborer with a railroad company. Since his return from military service he has been nervous and restless when not working, and he would go down town or drive his car. He further testified that he went to night school, attending a body and fender class. Prior to February 13, 1951, he had been on a vacation. He admitted the speed of his car to be 70 miles an hour on occasions, and that he slowed down for the truck as the headlights on the truck were set high. He further testified that his windows were not steamed up. One front wheel on his automobile was out of line which caused it to swerve to the left, and he was required to pull it back. He did not cross the center line of the pavement. He always slowed down for trucks and other cars. When he came to the curve he was traveling 75 miles an hour. He passed the cars on the curve, slowed down, and had stopped at Gretna to get something to eat when the patrolman came up. He was acquainted with the highway. His feet had been frozen on many occasions, and when he sat in the car for a long period of time his legs would go to sleep. When he stopped and got out of the car, the ground was rough and he turned his ankle a little bit. Two or three hours before the patrolman stopped him he had had a can of beer before he got to Ashland. He never wears a hat, and while he was out of the car near Linoma Beach his hair became mussed. He described the way he was dressed as the kind of clothes he usually wore to work.

The defendant's father testified that after the defendant went into the service the family moved from a farm to Lincoln, and defendant lived with them. Defendant was on vacation prior to February 13, 1951, and spent most of his time around the house. In the evening defendant attended a body and fender school.

Since his birth, defendant has had a defect of speech which retarded his schooling. When he got excited or nervous he stuttered very badly. He had trouble with his feet; they had been frozen. Damp weather caused him to have rheumatism, and when he would get up from a sitting position, he would stagger. This witness never saw the defendant drink too much beer.

In a prosecution against defendant for intoxication and for driving a motor vehicle while intoxicated, evidence of odor of alcoholic liquor on his breath, of staggering, of impaired control of mental faculties, and of disregard of danger resulting in accidents, and opinions by witnesses testifying from observation that he was intoxicated at the time and place charged, may be sufficient to sustain a conviction. See Rhodes v. State, 124 Neb. 147, 245 N. W. 402. See, also, Smith v. State, 124 Neb. 587, 247 N. W. 421.

"This court will not interfere with a verdict of guilty in a criminal case which is based upon conflicting evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt." Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462.

Before taking up other assignments of error contended for by the defendant, we make reference to Haffke v. State, *supra,* wherein section 39-727, R. S. 1943, was involved. This statute was amended in 1947 and 1949, and for the purposes of this case is section 39-727, R. S. Supp., 1949. The amendments, however, do not affect the subject matter contained in the act to the extent of making any material difference in determining the proceedings in error in the instant case as will subsequently appear from an analysis of Haffke v. State, *supra.* The statute provides in part as follows: "It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug. Any person who shall operate or be in actual physical

control of any motor vehicle while under the influence of alcoholic liquor or of any drug shall be deemed guilty of a crime and, upon conviction thereof, shall be punished as follows: * * *." Following this language the statute specifies the penalties to be assessed for a first, a second, and a third or subsequent offense. The penalties increase in severity in each instance. It is noted that the statute defines one crime. It provides different penalties within limits upon conviction depending upon whether the person found guilty had previously been convicted of one or more offenses under the statute. Nowhere in the statute is the jury given any function to perform with reference to the penalty. The penalties are in effect habitual criminal penalties limited to the one crime defined in the statute. See Jones v. State, 147 Neb. 219, 22 N. W. 2d 710.

The defendant in the cited case contended, as the defendant here, that the jury should have been allowed to decide whether or not the defendant was guilty of a lesser crime. The obvious answer is that the statute defines but one crime, that of operating a motor vehicle while under the influence of alcoholic liquor or of any drug.

This court, in Haffke v. State, *supra,* recognized a diversity of opinion respecting the province of court and jury where a charge is made of a second or subsequent offense, citing authorities, then went on to say: "In the absence of a statute placing upon the jury a duty with reference to the penalty (such as section 28-401, R. S. 1943), the penalty to be imposed after conviction of a criminal offense is not for the jury but for the court to determine within the limits fixed by the statute. * * * 'Except as to crimes having an element of motive, criminal intent, or guilty knowledge, evidence of separate and distinct offenses committed by accused is not admissible.' Swogger v. State, 116 Neb. 563, 218 N. W. 416; Henry v. State, 136 Neb. 454, 286 N. W. 338." The reason for these rules and the rules themselves are

in conflict with the conclusions announced in Wozniak v. State, 103 Neb. 749, 174 N. W. 298; Osborne v. State, 115 Neb. 65, 211 N. W. 179; Burnham v. State, 127 Neb. 370, 255 N. W. 48; Wiese v. State, 138 Neb. 685, 294 N. W. 482. This court then accepted as sound the reasoning of other courts, citing Sammons v. State, 210 Ind. 40, 199 N. E. 555; Levell v. Simpson, 142 Kan. 892, 52 P. 2d 372; Hill v. Hudspeth, 161 Kan. 376, 168 P. 2d 922; People v. Gowasky, 244 N. Y. 451, 155 N. E. 737, 58 A. L. R. 9; Graham v. West Virginia, 224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917. We deem it unnecessary to again set out the holdings in the afore-cited cases upon which this court relied in Haffke v. State, *supra*. To discern the applicability of such decisions we make reference to the Haffke case.

In Haffke v. State, *supra*, we said: "Accordingly, under section 25, article V, of the Constitution, we promulgate the following rule of practice and procedure in criminal cases hereafter tried in all courts. In the absence of a provision placing upon the jury a duty with reference to the penalty, where punishment is sought under any statute defining one crime and providing for an enhanced penalty upon conviction of a second or subsequent offense: (1) The facts with reference thereto must be alleged in the complaint, indictment or information upon which the accused is prosecuted; (2) the fact that the accused is charged with having committed a second or subsequent offense should not be an issue upon the trial and should not in any manner be disclosed to the jury; (3) if the accused is convicted, before sentence is imposed a hearing should be had before the court without a jury as to whether or not there have been any prior convictions of the accused under the same statute; (4) the accused should be given notice of the time of hearing at least three days prior thereto; and (5) at the hearing, if the court finds from the evidence submitted that the accused has been convicted prior thereto under the same statute,

the court should sentence the accused according to the enhanced penalty applicable to the facts found. This rule, of course, does not in any manner limit the application in a proper case of the provisions of section 25-1214, R. S. 1943."

The defendant predicates error on part 2 of the rule of practice and procedure in criminal cases as above stated, for the reason that such a rule deprives defendant of having a jury trial on all issues involved in the felony charge, which is guaranteed to him under the Constitution of Nebraska and the Constitution of the United States. Also, the defendant predicates error on part 3 of the practice and procedure in criminal cases as above stated, for the same reason, and on part 5 as previously stated, for the reason that under such rule defendant received the enhanced sentence for a felony rather than a misdemeanor, without having a trial by jury on the previous convictions. The defendant then relies on the cases of Wiese v. State, *supra;* Burnham v. State, *supra;* Osborne v. State, *supra;* and Wosniak v. State, *supra.* These cases are discussed in Haffke v. State, *supra,* and overruled insofar as the same were in conflict with the practice and procedure in criminal cases adopted in Haffke v. State, *supra.* We find no occasion to discuss the holdings in such cases again.

The defendant, in contending that he was deprived of and denied his constitutional rights cites the following: Article I, section 6, of the Constitution of Nebraska, to the effect that the right of trial by jury shall remain inviolate; Article III, section 2, of the Constitution of the United States, as follows: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; * * *"; amendment V of the Constitution of the United States, "* * * nor shall any person be subject for the same offense to be twice put in jeopardy * * * nor be deprived of life, liberty, or property, without due process of law; * * *"; amendment VI of the Constitution of the United States to the effect that the defendant shall be entitled

to a speedy and public trial by an impartial jury of the state; amendment XIV of the Constitution of the United States, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; Article I, section 11, of the Constitution of Nebraska with reference to the right of the defendant to have a speedy, public trial by an impartial jury of the county or district in which the offense is alleged to have been committed; and Article I, section 12, of the Constitution of Nebraska, "No person shall be compelled, in any criminal case, to give evidence against himself, or be twice put in jeopardy for the same offense."

The practice and procedure in criminal cases adopted in Haffke v. State, *supra,* is analogous to that now in effect in the habitual criminal act. This practice and procedure was adopted as a matter of sound public policy, and applies to any statute which imposes the duty upon a court to inflict a greater punishment on the repetition of an offense.

Under statutes providing for a higher penalty or more severe punishment to be imposed for a second or subsequent offense under the liquor laws than for a first offense, see Cisson v. United States, 37 F. 2d 330; Massey v. United States, 281 F. 293; and cases subsequently cited.

All questions here raised by the defendant against the constitutional validity of section 39-727, R. S. Supp., 1949, have been settled adversely to his contentions insofar as the Constitution of the United States is concerned. See, Graham v. West Virginia, *supra:* McDonald v. Massachusetts, 180 U. S. 311, 21 S. Ct. 389, 45 L. Ed. 542; State v. Findling, 123 Minn. 413, 144 N. W. 142, 49 L. R. A. N. S. 449; 16 C. J., Criminal Law, § 3151, p. 1339; 24 C. J. S., Criminal Law, § 1959, p. 1145; 8 R. C. L., Criminal Law, §§ 284, 285, 286, 287, pp. 271, 272, 273;

Moore v. Missouri, 159 U. S. 673, 16 S. Ct. 179, 40 L. Ed. 301; and as to state constitutions by decisions in numerous state courts. The reasoning supporting these decisions is equally applicable to the provisions found in the Constitution of Nebraska. See, a very complete note to State v. LePitre, 54 Wash. 166, 103 P. 27, 18 Ann. Cas. 922; In re Miller, 110 Mich. 676, 68 N. W. 990, 34 L. R. A. 398, 64 Am. S. R. 378; Note to Commonwealth v. McDermott, 224 Pa. 363, 73 A. 427, 24 L. R. A. N. S. 431; 1 Bishop on Criminal Law, 9 Ed., § 947 (7), p. 700, § 993a, p. 736; Jones v. State, 9 Okl. Cr. 646, 133 P. 249, 48 L. R. A. N. S. 204; Cross v. State, 96 Fla. 768, 119 So. 380; State v. Vandetta, 108 W. Va. 277, 150 S. E. 736; Rand v. Commonwealth (Va.) 9 Gratt. 738; People v. McCarthy, 45 How. Pr. 97; State v. Flynn, 16 R. I. 10, 11 A. 170; State v. Zywicki, 175 Minn. 508, 221 N. W. 900; Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82; Rains v. State, 142 Neb. 284, 5 N. W. 2d 887.

To set out the reasoning in the above-cited cases holding that habitual criminal acts, or an act such as involved in this case, are constitutional would unnecessarily lengthen this opinion and serve no useful purpose. We make reference to the same in answer to defendant's assignments of error attacking the constitutionality of the act here involved.

The question arises as to the identity of the accused, and whether he is the same person who was convicted of two previous offenses of like nature as provided for in the act. This hearing was had before the court. The defendant objected to the hearing before the court for the reason that he was denied his guaranteed constitutional rights. This objection was overruled. We have previously determined in the opinion the subject matter of the objection, and proceed to the evidence on this phase of the case.

The record discloses that the sheriff of Gage County arrested the defendant on November 26, 1949, when he found him driving a motor vehicle upon the public

highways of this state in said county, while under the influence of alcoholic liquor. He was taken by the sheriff before a justice of the peace. His constitutional rights were explained to him. The sheriff testified against him. Defendant voluntarily entered his plea of guilty. He paid a fine and his license to drive a motor vehicle was suspended, as provided for under the statute in question for the first offense. The transcript of proceedings in the justice court was admitted in evidence.

A member of the Nebraska Safety Patrol testified to arresting the defendant while he was driving a motor vehicle when he was under the influence of alcoholic liquor upon the public highways of this state, near Lincoln, Nebraska, on May 30, 1950. The defendant was taken before the municipal court at Lincoln, Nebraska, on May 31, 1950. The patrolman testified against the defendant. The transcript of the proceedings had in municipal court was admitted in evidence, showing that the defendant's motion to dismiss the case against him was overruled. He was fined $100 and costs, his driver's license suspended for one year, and his car impounded, as provided for the second offense under section 39-727, R. S. Supp., 1949. He appealed to the district court. The case was settled on December 1, 1950. Defendant paid his fine of $100 and costs, and his driver's license was suspended. Certified copy of these proceedings appears in the record.

Patrolman Whitney, the arresting officer, testified in the instant case and also in the hearing before the trial court which was held for the purpose of fixing the penalty, and identified the defendant as the same person charged in the information in the instant case.

All of the witnesses testifying at this hearing identified the defendant as the same person involved in the previous convictions, who was tried before a jury in the instant case. Such evidence is held to be sufficient on identification of the accused as the person convicted

of two previous offenses of the same nature. See, Sammons v. State, *supra;* Massachusetts Bonding & Ins. Co. v. State ex rel. Gary, 191 Ind. 595, 131 N. E. 398; Davis v. Commonwealth, 230 Ky. 732, 20 S. W. 2d 731; Belcher v. Commonwealth, 216 Ky. 126, 287 S. W. 550; Graham v. West Virginia, *supra;* State v. Dale, 115 Wash. 466, 197 P. 645.

We conclude, in the light of the evidence and the foregoing authorities, that the defendant was properly identified as the person who committed two previous offenses, as provided for in section 39-727, R. S. Supp., 1949, and was convicted of two previous offenses; also that he was the person identified and convicted of the offense charged in the information in the instant case.

Other assignments of error are without merit and need not be discussed.

We adhere to the principles of law announced in Haffke v. State, *supra.*

There appearing to be no prejudicial error in the record, we conclude that the verdict of the jury and the sentence of the trial court should be, and are hereby, affirmed.

AFFIRMED.

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## WALLACE G. QUEST, APPELLANT, V. EAST OMAHA DRAINAGE DISTRICT, A CORPORATION, APPELLEE.

52 N. W. 2d 417

Filed March 21, 1952. No. 33087.

1. **Constitutional Law.** Constitutional guarantees are of little avail unless carried out in the spirit in which they were framed, and no plea of public benefits should be permitted to impoverish the owner of private property, or override a plain constitutional inhibition.
2. **Eminent Domain.** The purchase of property by a public corporation, where it could have been acquired by the power of eminent domain, carries with it all the incidents of taking or damaging

by eminent domain insofar as the question of damages by reason of the taking or damaging is concerned.

3. **Constitutional Law: Eminent Domain.** One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking but also is liable, by virtue of Article I, section 21, of the Constitution of Nebraska, for consequential damage to other property in excess of the damage sustained by the public at large.
4. ———: ———. The words, "or damaged," in Article I, section 21, of the Constitution of Nebraska, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.
5. ———: ———. In a suit to recover damages under the constitutional provision for damage to property for public use, it is immaterial whether the petition states a cause of action ex delicto or ex contractu. If the fact is established that property has been damaged for public use, the owner is entitled to compensation.
6. **Eminent Domain.** Where land is not taken, the measure of damages is the difference in market value before and after the damaging, taking into consideration the uses to which the land was put and for which it was reasonably suitable.
7. ———. Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled.
8. ———. The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property.
9. **Constitutional Law: Eminent Domain.** In a case based on the constitutional provision, proof of negligence or the commission of a wrongful act is not necessary to a recovery.
10. ———: ———. In an action for damages based upon Article I, section 21, of the Constitution of Nebraska and against a drainage district organized under the provisions of Chapter 31, article 4, R. S. 1943, for the damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice as provided by section 31-451, R. S. 1943.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Reversed and remanded.*

*William H. Thomas,* for appellant.

*Fraser, Connolly, Crofoot & Wenstrand,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action for damages, allegedly caused to plaintiff's real estate, by reason of an excavation made by defendant on its land adjoining that of the plaintiff. Issues were made and trial was had. At the close of all the evidence, on motion of defendant, the trial court discharged the jury and dismissed the action. Plaintiff appeals. We reverse the judgment of the trial court and remand the cause.

It was stipulated that the defendant was a corporation organized and existing under the provisions of Chapter 31, article 4, R. S. 1943. As such it had the power of eminent domain. § 31-415, R. S. 1943.

So far as is necessary for the requirements of this opinion, we summarize the evidence in accord with the rule that "A motion to dismiss or for directed verdict admits the truth of all material and relevant evidence adduced by the party against whom the motion is made, and such party is entitled to have such evidence considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing validity of the court's action in disposing of the motion." Weisenmiller v. Nestor, 153 Neb. 153, 43 N. W. 2d 568.

The two tracts of land involved are situated in an irregular tract in an area classed as the 5th Residence District in the City of Omaha. Defendant's land is (roughly) a triangular piece bounded by Twenty-fifth Street on the west, Sharon Drive on the north, and Pershing Drive on the northeast. Plaintiff's land is contiguous to defendant's land on the south and borders on Twenty-fifth Street.

Plaintiff purchased his land in August 1945. At that time it was and still is generally on the same level as

Twenty-fifth Street. To the north the land which defendant now owns was also of that same height for some distance and gradually sloped down to Sharon Drive. There were residences constructed along the west side of Twenty-fifth Street. The land to the north of plaintiff's, then a cornfield, was suitable for residence construction, facing Twenty-fifth Street to Sharon Drive. Pershing Drive, running northwest to southeast, is at a level appreciably lower than Twenty-fifth Street. Defendant's land had been excavated along Pershing Drive to the approximate level of the Drive and back for some distance into that land, leaving a cliff, as viewed from the Drive. The closest this cliff came to plaintiff's land was 50 feet at the northeast corner or to the north and rear of plaintiff's land. It then angled to the northwest and away from plaintiff's land.

Plaintiff's family consisted of himself, his wife, and three minor children. He began the construction of a house on his property in March 1946. He moved into the incompleted house in May 1946, and thereafter he and his family occupied it as a home, both before and after its completion as a modern home. His house was set back from Twenty-fifth Street and at its closest point was 28 feet from his north or common boundary line with defendant's property.

Defendant purchased its land for the specific purpose of excavating dirt therefrom for use on its levee. In September 1946 it began its excavation. Defendant allowed a strip of land 8 to 10 feet in width to remain undisturbed along its south line and its west line on Twenty-fifth Street. It cut a bank at a slope of one-quarter to one along that line and excavated the balance of its land to a grade below that of Sharon Drive and Pershing Drive. The result was that a cliff 40 feet high was made along the south side of its land contiguous to plaintiff's property and 38 feet from plaintiff's house, and a cliff from 40 down to 15 feet high at Sharon Drive along the west side of its property. In

so doing it destroyed the use of its property for residential purposes, so far as Twenty-fifth Street was concerned. It built a high wire fence on the boundary line around the property above the cliff on both the south and west sides of its property. Children could and did get under the fence and play on the land above the cliff with the resulting danger that the cliff presented. Fires were started in that area.

Dirt sloughed off from the face of the cliff and in times of high wind, dust blew up the cliff and into plaintiff's house, and dust and litter blew into his yard. Wind coming up the face of the cliff blew roofing and shingles from the north side of the house. It was necessary to double-insulate the north side of the house and expend extra amounts for heat because of it. The dust problem did not exist prior to the excavation work.

There was a railroad line some 500 or 600 feet east of these properties. When trains passed, the noise was excessive and the house and articles in it vibrated. These vibrations caused cracks in the walls and ceilings on the north side. Annoying noise and vibrations were not experienced prior to the excavation.

Pools of stagnant water were in the excavated area. Mosquitoes became quite bothersome in the summertime after the excavation, but were not experienced prior thereto.

Hundreds of cliff swallows nested in the cliff made by the excavation. They flew over the property of plaintiff with resultant noise and filth in the yard and on person and property. That condition was not a noticeable one prior to the excavation, although there were swallows in the cliff to the northeast prior to the excavation. These swallows and their nests were attractive to children and caused them to try to get to the nests and to shoot the birds.

The existence of the excavated area and the cliff, and the other matters resulting from it, have materially depreciated the market value of plaintiff's property and re-

stricted its use. Plaintiff's expert witness estimated the depreciation at $6,000. Defendant's expert witness estimated the adverse effect of the existence of the excavation and the cliff on the market price at $1,000 to $2,000.

Defendant offered evidence that controverted most, if not all, of these contentions. However, it is not material to a determination of the question here presented.

Plaintiff contends that it was error to refuse to submit the case to the jury. Plaintiff rests his contentions here upon either or both of two propositions: First, upon the constitutional provision that "The property of no person shall be taken or damaged for public use without just compensation therefor." Art. I, § 21, Constitution of Nebraska. Second, plaintiff contends that the use made of its property by the defendant constitutes a nuisance for which damages may be recovered.

Defendant here challenges those two contentions and advances a third which is that plaintiff failed to serve the notice provided for in section 31-451, R. S. 1943.

There is no contention here of negligence in defendant's acts. There is no contention of a removal of lateral support.

We have heretofore stated the rules of law that determine the questions here presented.

As above stated, defendant is a public corporation organized under the laws of this state and has the power of eminent domain. There is no question here that the excavation was made for a public use. Defendant pleads that this property was the only available property from which earth could be taken without substantially increasing the cost. In that connection we call attention to our statement that "Constitutional guarantees are of little avail unless carried out in the spirit in which they were framed, and no plea of public benefits should be permitted to impoverish the owner of private property, or override a plain constitutional inhibition." City of

Omaha v. Kramer, 25 Neb. 489, 41 N. W. 295, 13 Am. S. R. 504.

The following rules are stated in Snyder v. Platte Valley Public Power and Irrigation Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154:

The purchase of property by a public corporation, where it could have been acquired by the power of eminent domain, carries with it all the incidents of taking or damaging by eminent domain insofar as the question of damages by reason of the taking or damaging is concerned.

One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking but also is liable, by virtue of Article I, section 21, of the Constitution of Nebraska, for consequential damage to other property in excess of the damage sustained by the public at large.

The words, "or damaged," in Article I, section 21, of the Constitution of Nebraska, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.

In a suit to recover damages under the constitutional provision for damage to property for public use, it is immaterial whether the petition states a cause of action ex delicto or ex contractu. If the fact is established that property has been damaged for public use, the owner is entitled to compensation.

Where land is not taken, the measure of damages is the difference in market value before and after the damaging, taking into consideration the uses to which the land was put and for which it was reasonably suitable.

" 'Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled.' " Luchsinger v. Loup River Public Power Dist., 140 Neb. 179, 299 N. W. 549.

" 'The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property.' " Asche v. Loup River Public Power Dist., 136 Neb. 601, 287 N. W. 64.

In a case based on the constitutional provision, proof of negligence or the commission of a wrongful act is not necessary to a recovery. Wagner v. Loup River Public Power Dist., 150 Neb. 7, 33 N. W. 2d 300.

Tested by these rules it is patent that plaintiff, under the constitutional provision, was entitled to have the issue of his damages submitted to the jury for determination. The trial court erred in sustaining the motion of defendant. This makes a consideration of the nuisance theory unnecessary.

This brings us to the defendant's contention that plaintiff's action is barred because of failure to plead and prove the giving of the notice required by section 31-451, R. S. 1943. That statute is in part as follows: "No drainage district organized under the laws of Nebraska shall be liable for damages arising out of the construction or maintenance of any of the work of the said district unless actual notice in writing, describing fully the accident and the nature of the injury complained of, describing the defects causing the injury, and stating the time when and with particularity the place where the accident occurred, shall be proved to have been filed with the secretary of the board of directors of the district within thirty days after the occurrence of such accident or injury, except in cases involving minors or incompetents, or where the person injured is incapacitated to the extent that he is unable to give such notice or to employ an agent or attorney to do so in his behalf."

The transcript shows that on the opening day of the

trial plaintiff amended his petition, with court permission, and alleged that he had notified the defendant in writing of the damage to his property. There was evidence of letters that passed between the parties. We need not determine their sufficiency as to compliance with the statute.

Defendant relies upon Bartels v. Drainage District, 122 Neb. 340, 240 N. W. 434. That case was one based on negligent construction and maintenance.

Plaintiff relies upon Bridge v. City of Lincoln, 138 Neb. 461, 293 N. W. 375. There a similar claim involved a charter provision comparable to the statute here involved. That decision answers the defendant's contention here. Accordingly we hold that in an action for damages based upon Article I, section 21, of the Constitution of Nebraska and against a drainage district organized under the provisions of Chapter 31, article 4, R. S. 1943, for the damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice as provided by section 31-451, R. S. 1943.

For the reasons given herein, the judgment of the trial court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

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GRAND ISLAND FINANCE COMPANY, A CO-PARTNERSHIP CONSISTING OF EDGAR REYNOLDS AND FRANCES REYNOLDS, APPELLANT, V. EDDIE EACKER, APPELLEE.
52 N. W. 2d 805

Filed April 4, 1952. No. 33110.

1. **Appeal and Error.** A finding of fact by the court in a law action, where the finding by a jury is waived by the parties, will not be disturbed on appeal unless clearly wrong.
2. **Usury.** A loan made at a place of business in violation of the

provisions of section 45-123, R. S. 1943, is void and uncollectible under the provisions of section 45-155, R. S. 1943.

APPEAL from the district court for Custer County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

*Johnson & DesJardien,* for appellant.

*E. F. Myers,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This case started as an action in replevin based on a promissory note secured by chattel mortgage. The security was not taken under the writ. The action proceeded as one for damages. Defendant pleaded by way of answer that the debt was void and uncollectible and that it had been paid. A jury was waived and trial had to the court, resulting in finding generally against the plaintiff and for the defendant, and that the debt had been satisfied in full. The trial court entered judgment for the defendant and dismissed plaintiff's petition. Plaintiff appeals. We affirm the judgment of the trial court.

Treating the judgment as one against it on both issues, plaintiff challenges its correctness as to both issues.

We review the evidence subject to the rule that "A finding of fact by the court in a law action, where the finding by a jury is waived by the parties, will not be disturbed on appeal unless clearly wrong." Witthauer v. Employers Mutual Casualty Co., 149 Neb. 728, 32 N. W. 2d 413.

Plaintiff is a copartnership. License was issued to it to carry on the business of making loans at Broken Bow, Nebraska, under the provisions of what are now sections 45-114 to 45-155, R. S. 1943. In the application for this license plaintiff designated Geo. F. Dudley as the manager who was to have charge of the business under the license. The license has been renewed annually.

Under date of March 28, 1942, the Department of Banking granted plaintiff permission "to conduct your direct loan business in the same office in which Mr. Dudley, your manager, conducts an insurance business and a real estate loan business."

We take up first the issue as to whether or not the indebtedness was void and uncollectible.

The evidence is that from 1946 to 1949, Mr. Dudley conducted in his office not only the loan business of the plaintiff, but also wrote life insurance, accident insurance, car insurance, and fire - dwelling-house insurance; bought and sold new and used cars, trucks, combines, and farm machinery; wrote bonds; and collected rents on business houses—the evidence not being clear as to whether he owned these business houses or handled them on an agent basis. He also managed a ranch from his office.

The note here involved was one given November 22, 1948, to refinance the balance due on a note originally given by the defendant for the purchase of a combine from Dudley in August 1947. The note given for that purchase was endorsed payable to plaintiff on a printed form.

The evidence is that defendant had sold cars for Dudley. About the middle of July 1947, defendant, at Dudley's request, went to Dudley's office to look at a used car. Dudley then proposed to defendant that he buy a combine, which defendant did.

Defendant's first defense is based on sections 45-123 and 45-155, R. S. 1943.

Section 45-123, R. S. 1943, so far as important here, provides: "No licensee shall conduct the business of making loans under sections 45-114 to 45-155 within any office, room or place of business in which any other business is solicited or engaged in, or in association or conjunction therewith, except as may be authorized in writing by the Director of Banking for the Department of Banking upon his finding that the character of

such other business is such that the granting of such authority would not facilitate evasions of said sections, or of the rules and regulations lawfully made thereunder; * * *."

Section 45-155, R. S. 1943, is: "Violation of sections 45-114 to 45-155 in connection with any indebtedness, however acquired, shall render such indebtedness void and uncollectible."

The evidence is ample, in fact undisputed, to sustain a finding that at all times involved here, plaintiff's business of making loans was conducted in an office and at a place of business in which other business was solicited and engaged in which was outside of and beyond the authority in writing of the Director of Banking.

The question then comes, is the indebtedness sued on void and uncollectible? Obviously it is if the plain language of the statute is to be followed.

Our decisions point directly to the answer.

In Motors Acceptance Corp. v. McLain, 154 Neb. 354, 47 N. W. 2d 919, we said: "The small loan business is one which is subject to regulation because of the abuses which seem to be inherently linked with it."

In Mack Investment Co. v. Dominy, 140 Neb. 709, 1 N. W. 2d 295, we had an action in replevin based on a loan made under the act then in force. The defense was usury. The statute there involved provided that if interest or charges in excess of those prescribed shall be received, the licensee shall "lose all his right to collect or receive any sum whatever on said indebtedness." We held that the licensee, because of brokerage charges, lost his right to collect any sum whatever on this indebtedness and "The letter of the statute admits of no other interpretation by any construction." In the course of the opinion we said: "The purpose and intent of the legislature in passing this act were to protect the borrower against excessive and usurious rates of interest on small loans, and other charges, made under

one subterfuge or another, and to control and regulate, rather than protect, the lender."

In Nitzel and Co. v. Nelson, 144 Neb. 662, 14 N. W. 2d 197, we had an action in equity to foreclose securities given for the payment of promissory notes. The defense was usury under the small loan law based on the prior act, sections 45-143 and 45-144, C. S. Supp., 1941. There the statute provided that if interest or charges in excess of the prescribed amount were contracted for, collected, or received, the licensee "shall thereupon lose all of his right to collect or receive any sum whatsoever on said indebtedness." We held that because of usury and excess charges the notes were "void and uncollectible." In the course of the opinion we said: "The duty of the court in the premises is clear and distinct."

In Union Loan Assn. v. Woodie, 13 N. J. Misc. 214, 177 A. 438, the Supreme Court of New Jersey had before it a case that involved a statute which provided that no corporation or association licensed under their act "shall transact or solicit business under any other name or at any other office or place of business than that named in the license." The statute further provided that "every loan in connection with which such violation shall have occurred shall be absolutely null and void * * *." One of the defenses was that the loan had been made under the name of Union Loan Company, rather than Union Loan Association, which was the corporate title. The court held that the use of the word "company" was a clear violation of the act. The court said: "It is a harsh rule, but clearly intended to be such. The abuses growing up under this class of loans no doubt operated to induce the passage of this stringent legislation, and the purpose of the act is obviously to hold loan companies incorporated under the act to the strictest accountability, * * *." The above decision was cited with approval in Ryan v. Motor Credit Co., Inc., 130 N. J. Eq. 531, 23 A. 2d 607, a decision of the Court of Chan-

cery. That case was affirmed by the Court of Errors and Appeals in 132 N. J. Eq. 398, 28 A. 2d 181, 142 A. L. R. 640.

We hold that a loan made at a place of business in violation of the provisions of section 45-123, R. S. 1943, is void and uncollectible under the provisions of section 45-155, R. S. 1943.

We consider briefly the plea of payment.

The evidence is that at the time the note and chattel mortgage here involved were executed defendant gave Dudley positive directions to sell the combine and liquidate the debt, the new papers being executed to permit a reasonable opportunity to do that to advantage. Dudley sold the combine in February 1949, and advised defendant of the sale, but said he had not then received the money. On April 14, 1949, Dudley told defendant he had received the payment for the combine; that it was not sufficient to pay the debt; and that there was still due a balance of $58 which defendant paid and received a receipt for balance of loan in full, calculated from the records in Dudley's office of plaintiff's loans. There was some effort made to show that this receipt was antedated to avoid the date of termination of Dudley's authority as manager. There is ample evidence to show that the final payment of $58 and the receipt antedated the termination date. It is a fact question determined by the trial court.

Without further reciting the evidence we hold it ample to sustain the judgment of payment.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE ESTATE OF MARY E. DRYDEN, DECEASED. PATRICIA JEAN JOHNSON ET AL., APPELLANTS, V. E. O. RICHARDS, EXECUTOR OF THE ESTATE OF MARY E. DRYDEN, DECEASED, ET AL., APPELLEES.
52 N. W. 2d 737

Filed April 4, 1952. No. 33118.

1. **Process.** The requirement of publication of a notice in a newspaper three weeks successively is complied with by publication on one day of each of three weeks, that is, three successive weekly publications.
2. ———. In such an instance the notice is complete upon the distribution of the last issue of the paper containing the notice though three full weeks did not elapse after the first publication.
3. **Time: Process.** The construction of the statute providing for notice of the time and place of proving a will, as made by this court, was not changed or affected by section 25-2228, R. R. S. 1943.
4. ———: ———. Section 25-2228, R. R. S. 1943, does not refer to the period during which a notice or legal publication must be published but it was intended to and does limit the number of issues in which the notice must appear when the medium of publication has more than one regular issue each week.
5. **Constitutional Law: Appeal and Error.** This court will not in an appeal consider or determine the constitutionality of a statute unless it has been made an issue in the case in the trial court.
6. **Appeal and Error.** Generally a case in this court on appeal will be limited to errors assigned and discussed and an assignment of error not discussed will be considered waived.
7. **Executors and Administrators.** The authority of an executor, in this state, is principally but not solely derived from the will in which he is nominated and it is not complete until the court has approved his nomination, he has qualified, and he has been granted letters testamentary by the court.
8. **Fraud.** Though one is under no duty to speak, if he does so, he must tell the truth and not suppress or materially qualify facts within his knowledge affecting the subject of his disclosure. Fraudulent representations may consist of half-truths calculated to deceive and a representation literally true is fraudulent if used to create an impression substantially false. A slight imposition may terminate the privilege of silence.
9. ———. Extrinsic or collateral fraud is that practiced in the act of obtaining an adjudication in the course of litigation. It consists of something done by the successful party that prevents

the unsuccessful party, because of the fraud or deception practiced on him, from presenting his case or defense so that there was not a real contest in or actual litigation of the issue of the case.

10. **Executors and Administrators.** The personal representative of an estate and his attorney are both fiduciaries in their relation to the estate of the deceased and the persons interested therein.

11. **Trusts.** It is the duty of a trustee to fully inform the cestui que trust of all facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material to the cestui que trust to know for the protection of his interests.

12. ———. Every violation by a trustee of a duty required of him by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.

13. **Fraud: Judgments.** The equity powers are ample, independently of statute, to set aside a probate procured by fraud.

APPEAL from the district court for Deuel County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions.*

*Dallas A. Clouse,* and *Beatty, Clarke, Murphy & Morgan,* for appellants.

*Baskins & Baskins, Edward E. Carr, Richard D. Dittemore,* and *Greydon L. Nichols,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an action in equity commenced in the county court by appellants against appellees to set aside a decree admitting to probate the will of Mary E. Dryden, deceased, on the ground that the probate thereof was obtained by fraud and that appellants have valid legal objections to its probate. Appellants were the grandniece and grandnephew respectively of the deceased, and are her only relatives. They and appellees are the beneficiaries named in the will, and E. O. Richards is the executor of the will and the estate of the deceased.

The will was without contest admitted to probate and about four months thereafter the petition was filed by appellants to vacate the order of probate and to be permitted to contest the will. The county court sustained demurrers of appellees to the petition and an appeal was taken to the district court. That court sustained the general demurrers filed therein by appellees to the petition and rendered a judgment of dismissal.

Appellants challenge the validity of the judgment of the district court because they claim that lawful notice of the hearing of the petition for the probate of the will of the deceased was not given. The defect alleged by them is that the order of the county court designated November 3, 1950, as the date of hearing of the petition for the probate of the will and required notice to be published as provided by law in the Chappell Register, a weekly newspaper. The notice was published in the issues of the paper of October 19, October 26, and November 2, 1950. The hearing was had and the decree of probate of the will was rendered on November 3, 1950, 15 days after the first publication of the notice. The notice was not published for three weeks successively covering a period of 21 days as appellants assert the law requires.

The statute requires that notice of the time and place of proving a will shall be given by publication in a newspaper designated by the judge of the county court "three weeks successively, and no will shall be proved until notice shall be given as herein provided * * *." § 30-217, R. R. S. 1943. Publication of notice sufficient to satisfy the demands of this statute was determined many years ago. The requirement of publication of a notice in a newspaper "three weeks" is complied with by the publication thereof in a weekly paper on one day of each of three weeks, that is, three successive weekly publications. The notice is complete upon distribution of the last issue of the paper containing the notice though three full weeks have not elapsed since the first

publication. Alexander v. Alexander, 26 Neb. 68, 41 N. W. 1065; State v. Hanson, 80 Neb. 724, 115 N. W. 294; Claypool v. Robb, 90 Neb. 193, 133 N. W. 178; In re Estate of Johnson, 99 Neb. 275, 155 N. W. 1100; Pohlenz v. Panko, 106 Neb. 156, 182 N. W. 972.

The act of 1915 defining the word "week" as used in certain statutes providing for publication of notices did not change or affect the construction of the statute providing for notice of the time and place of proving a will. Laws 1915, c. 222, p. 491; § 25-2227, R. R. S. 1943; In re Estate of Johnson, *supra*. It is conceded in this case that this is also true as to the act of 1917 on the subject of the publication of notices and other legal publications. Laws 1917, c. 202, p. 481. Likewise it is obvious that the act of 1923 by its terms applied only to the publication of notices and other legal publications required by law to be published "a certain number of days" when published in a daily, semiweekly, or triweekly paper. Laws 1923, c. 100, p. 255.

In Claypool v. Robb, *supra*, it was decided that a provision of the code that publication must be made four consecutive weeks was satisfied by publication in a weekly newspaper once each week for four consecutive weeks "But, where the notice is published in a paper having more than one issue during the week, insertion of the notice in each of the regular issues during the week is necessary to a complete publication of the notice for that particular week." It was because of the holding of the court in reference to the publication of legal notices in newspapers having more than one regular issue in each week that the Legislature passed Laws 1927, c. 63, p. 225. The amendment thereof in 1943 made no material change. It added a sentence defining a daily newspaper. Laws 1943, c. 47, p. 197; § 25-2228, R. R. S. 1943. The parts thereof pertinent to the problem now being considered are: "All legal publications and notices * * * that may by law be required to be published a certain number of days or a certain num-

ber of weeks shall be legally published when they have been published in one issue in each week in a daily, semiweekly or triweekly newspaper, such publication * * * to be made upon any one day of the week upon which such paper is published, except Sunday * * *. Nothing in this act contained shall be construed as preventing the publication of such legal notices and publications in weekly newspapers. * * * All legal publications and all notices of whatever kind or character that may be required by law to be published a certain number of days or a certain number of weeks, shall be and hereby are declared to be legally published when they shall have been published once a week in a weekly, semiweekly, triweekly or daily newspaper for the number of weeks, covering the period of publication."

The Legislature, by any of the acts above referred to, did not intend to enact that in no case would a publication be complete until the full number of weeks mentioned had elapsed after the first publication. This result if desired by the Legislature could easily have been accomplished by simple and clear language. Its objective was not to destroy the rule that where the time mentioned by the statute indicates only the number of times the notice is required to be published, it is satisfied if the notice is published the number of times mentioned. The purpose and intention of the Legislature were to eliminate the requirements of Claypool v. Robb, *supra*, and to provide that the insertion of the matter required to be published in one regular issue of a legal paper in any week should be a legal and sufficient publication for that period without regard to whether the paper had one or more than one regular issue during that period. The act of 1943 does not refer to the duration or period during which a notice or other legal publication must be published but it was intended to and does limit the number of issues in which the notice must appear when the medium of publication has more than one regular issue each week. The object of the act was

to put weekly newspapers and newspapers with more than one regular issue each week in the same situation in reference to the publication of notices and other publications. The time mentioned in the last part of the act that all legal publications and notices required by law to be published a certain number of weeks shall be legally published "when they shall have been published once a week in a weekly, semiweekly, triweekly or daily newspaper for the number of weeks, covering the period of publication" indicates only the number of times the notice is required to be published and does not refer to the duration of the notice. See, In re Estate of Johnson, *supra;* Davies v. American Investment & Trust Co., 94 Neb. 427, 143 N. W. 464; Claypool v. Robb, *supra;* State v. Hanson, *supra;* Davis v. Huston, 15 Neb. 28, 16 N. W. 820.

Appellants assail the legal sufficiency of the notice given of the time and place of the hearing of the petition for the probate of the will of the deceased. They say that service of notice upon them by publication was a denial of due process of law in violation of Article XIV, section 1, of the Constitution of the United States and Article I, section 3, of the Constitution of Nebraska, because the residence and location of each of them were known to the executor and proponent and that anything less than personal service of notice on them failed to satisfy the demands of due process. This in short is a declaration that section 30-217, R. R. S. 1943, fails to meet constitutional requirements.

The record does not show that this issue was presented in any manner in the district court. It made its initial appearance in the brief of appellants in this court. In order for this court to consider the constitutionality of a statute, except in an original action, it must be raised and placed in issue in the trial court. Weekes v. Rumbaugh, 144 Neb. 103, 12 N. W. 2d 636, 150 A. L. R. 129; Madison County v. Crippen, 143 Neb. 474, 10 N. W. 2d 260.

The notice of the hearing for the probate of the will was legally published, the service was complete on November 2, 1950, and it was permissible to have a hearing on the next day.

Appellants requested I. J. Nisley, one of the judges of the Thirteenth Judicial District, to declare himself disqualified to act in the case in any of the proceedings had and they objected to his doing so on the grounds that he was prejudiced against appellants; that he was related to one of the beneficiaries named in the will of the deceased; that he had discussed matters involved in the case with and had advised some of the parties adverse to appellants; and that he was a material witness for appellants in reference to matters involved in the case. The request and objections were denied by Judge Nisley and demurrers to the petition of appellants to vacate the order of probate of the will of the deceased were heard by him and sustained. The denial of the request and objections is assigned as an error by appellants but the assignment is not discussed by them. Generally a case in this court will be limited to errors assigned and discussed and an assignment of error not discussed will be considered waived. Rules of Supreme Court, 8 a 2 (4); Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355; Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588; Daugherty v. State, 154 Neb. 376, 48 N. W. 2d 76.

The correctness or invalidity of the action of the trial court in sustaining the demurrers to the petition and adjudging a dismissal must be decided from a consideration of the facts well pleaded in the petition. It alleges that: Mary E. Dryden died on the 9th day of October 1950, a resident of Deuel County, and left an instrument purporting to be her will. It and a petition for the probate thereof were filed in the county court of that county and November 3, 1950, was designated as the date of hearing. A hearing was held at the time indicated. The instrument was admitted to probate as the will of the

deceased, and E. O. Richards was confirmed and qualified as executor of the will. The property of the deceased consisted of real and personal property estimated by the petition for probate to be worth $90,000. She left surviving her appellants, the grandchildren of a deceased sister of the testatrix, as her only heirs at law. The appellants, as was well known to the proponent of the will, Leta Ellen Koier, and Richards, resided and had resided for many years at 209 West 46th Street in Seattle, Washington. Richards wrote the petition for the probate of the alleged will of the deceased and stated therein the correct address of appellants. Neither of them knew of the death of Mary E. Dryden, the existence of a will made by her, the filing in court for probate of an instrument claimed to be her will, nor the institution of any proceedings in regard thereto or with reference to her estate until they received on October 30, 1950, a letter from Richards dated October 27, 1950, stating the fact of the death of Mary E. Dryden, enclosing an alleged copy of the instrument said to be the will of the deceased, and advising appellants that the "will was in the process of being probated." Appellants had no knowledge of the date of hearing for the probate of the will of the deceased or of any date fixed for any hearing or proceedings in regard to the estate of the deceased until shortly before the filing of their petition in this case. The letter of Richards was silent as to all of such matters. Appellants immediately upon receipt of his letter wrote and mailed him a request for information as to the date of hearing on the probate of the will. He did not answer the request but remained silent and gave appellants no further information.

The instrument probated as the will of the deceased was prepared by Richards, a member of the Bar of Nebraska, and for many years prior thereto attorney for the testatrix and there was and had been between them a close fiduciary relationship. The preparation and execution of the will were under the personal and direct

supervision, management, and direction of Richards. He is principal beneficiary of the will and is named and designated therein as executor. He, as a part of a plan to secure for himself the property of the deceased, by the use of arts, devices, contrivances, and deception and by making use of the implicit confidence and trust which the deceased had for him, advised, persuaded, and induced her to make during a considerable period of time several wills and other instruments, each suggested and prepared by him, changing the disposition of her property, and each change made in these resulted in the gift of a greater part of her property to him. These instruments or any of them were not the product of the free and voluntary act of the deceased but each was the product of the fraud and undue influence of Richards, of such a nature and to such an extent, that they and each of them, including the one probated as the will of the deceased, were his instruments.

Richards during several years preceding the death of Mary E. Dryden induced and caused his wife to and she did make frequent visits to and spent much of her time at the home of the deceased, did errands for her, cooked her meals, complied with her every wish, and performed for her a vast number of personal favors and courtesies. Richards during this time frequently called at the home of the deceased and visited with her. These things were done as a part of a plan of ingratiating Richards in the trust and confidence of the deceased and enabled him to influence and control her in the disposition of her property to his advantage and profit. It was by virtue of these facts that he became the principal beneficiary and executor of the instrument probated as the will of the deceased.

The will was made on the 9th day of January 1950. The testatrix was an elderly woman, feeble in body and mind, physically and mentally weak and ill. She was and had been under the care of physicians. Richards was at that time and for several years prior thereto had

been the personal adviser and legal counselor of the testatrix in all of her personal and business matters. He was her close friend and confidant, and had gained and had her friendship, trust, and complete confidence to the extent that he was able to and did dominate and control her. She accepted, believed, and acted upon advice, counsel, or directions given her by him. The instrument signed by her on January 9, 1950, purporting to be her will was the result of the fraud and undue influence of Richards and was not and is not the will of the testatrix. He was not related to her, was not a natural object of her bounty, and had no relationship to her except as he had become acquainted with her as her counselor and adviser and thereafter ingratiated himself in her friendship, confidence, and trust.

He prepared, had executed, and filed the petition of the proponent for the probate of the will. He knew the date of the hearing to be had thereon, deliberately and fraudulently refrained from informing appellants of the facts in reference thereto except as above stated, and did not at any time advise them of the date of the hearing. He deliberately planned to deceive and did deceive appellants concerning the true facts of the making of the alleged will, its validity and force, and the time when it would be before the court for examination and probate. He knew at all of the times referred to that appellants were the only heirs at law of the deceased. He was the attorney for her estate, acted as such from the time of her death, and was present and conducted the proceedings on behalf of her estate and himself at the hearing for the probate of the will.

The objections of appellants to the probate of the alleged will of the deceased filed at the time of the filing of the petition to set aside the decree of probate are absence of due execution, mental incapacity of the deceased, and undue influence.

Appellants argue that a person designated in a will

as executor becomes such at the time of the death of the testator; that he is from that time vested with all the rights, powers, and duties and is subject to all the obligations, responsibilities, and liabilities of an executor; and that he then has without further act, proceedings, or adjudication the status of a fiduciary towards the estate, the beneficiaries, and the heirs of the deceased.

At common law the executor derived his power and authority solely from the will by which he was appointed, and not from the probate, which was held to be only evidence of his right. In this state and many of the other states the authority of an executor, while derived primarily from the will is not derived solely therefrom, is not complete until the court has approved his nomination, the executor has qualified by complying with certain statutory requirements, and has been granted letters testamentary by the court. In re Estate of Blochowitz, 124 Neb. 110, 245 N. W. 440; In re Estate of Haeffele, 145 Neb. 809, 18 N. W. 2d 228; State ex rel. Huber v. Tazwell, 132 Or. 122, 283 P. 745; In re Birkholz's Estate (Iowa), 197 N. W. 896; Davenport v. Sandeman, 204 Iowa 927, 216 N. W. 55; In re Estate of Swanson, 239 Iowa 294, 31 N. W. 2d 385; Estate of Svacina, 239 Wis. 436, 1 N. W. 2d 780; Annotation, 95 A. L. R. 828; 33 C. J. S., Executors and Administrators, § 22, p. 903. Richards became executor of the will of Mary E. Dryden when he was appointed and qualified on the 3d day of November 1950.

The date of the hearing for the probate of the will was November 3, 1950. The second publication of the notice of the hearing was October 26, 1950. The appellants, the heirs at law of the deceased, had no information of the death of Mary E. Dryden, that she left an alleged will, or of the pendency of the proceedings affecting it or her estate. They resided, as the proponent and Richards knew, in Seattle, Washington. The appellants received on October 30, 1950, a letter from Rich-

ards dated October 27, 1950, that stated the fact of the death of Mary E. Dryden, contained a copy of her will, and advised them that it "was in the process of being probated." The appellants upon receipt of the letter immediately wrote to Richards and requested him to inform them "the date of a hearing upon the probate of the will." He wholly disregarded the request of their letter to him.

It is unnecessary in this case to consider what the duty of Richards was, if any, in reference to appellants before he volunteered to give partial information to them by his letter of October 27, 1950. But when he broke his silence he became obligated to truthfully and completely state the facts within the limits of his information and knowledge in regard to the subjects referred to by his letter and enclosure transmitted with it, and not to withhold or distort anything that would tend to cause appellants to remain inactive.

Though one may be under no duty to speak, if he undertakes to do so, he must tell the truth and not suppress facts within his knowledge or materially qualify them. Fraudulent representations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false. In Long v. Krause, 105 Neb. 538, 181 N. W. 372, the court said: "A stranger, having secret knowledge of valuable mineral deposits in the waters of a private lake on land, may purchase the land without disclosing his superior knowledge, but a slight imposition on his part may terminate his privilege of silence; and, if he speaks falsely on matters relating to his secret knowledge and to the purpose of his purchase and thus deceives the owner into making a sale, he may be held liable for resulting damages." The opinion in that case states that this principle more than a century before was expressed in Turner v. Harvey, 1 Jac. (Eng.) 169, in this language: "* * * if an estate is offered for sale, and I treat for it, knowing that there

is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate." See, also, Ash Grove Lime & Portland Cement Co. v. White, 361 Mo. 1111, 238 S. W. 2d 368; Boas v. Bank of America, 51 Cal. App. 2d 592, 125 P. 2d 620; Blackstock Oil Co. v. Caston, 184 Okl. 489, 87 P. 2d 1087; Associated Indemnity Corp. v. Del Guzzo, 195 Wash. 486, 81 P. 2d 516; Dennis v. Thomson, 240 Ky. 727, 43 S. W. 2d 18; Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. S. R. 373; Restatement, Torts, Vol. 3, §§ 529, 550, pp. 67, 116; 37 C. J. S., Fraud, § 16, p. 246; 23 Am. Jur., Fraud and Deceit, § 83, p. 861.

The conclusion is reasonable that the motive that prompted Richards to give appellants the information he did was either to be of assistance to them in timely asserting any rights they claimed or had as heirs at law of the deceased that conflicted with the provisions of the will or that his purpose was to mislead them until an order of probate had been entered and the adjudication foreclosed a contest. It is difficult to develop any other reasonable alternative from the facts alleged in the petition and admitted by the demurrers.

If the motive was to be helpful, then it taxes credulity to believe that Richards would have delayed his letter until after the second publication of the notice with the date of hearing only a few days away and would also have neglected and omitted to have told appellants the most important fact that the date of the hearing on the probate of the will was November 3, 1950. He knew, as a lawyer, that prompt action by them could have secured a postponement of the hearing to a reasonable date in the future. The matters alleged by appellants are convincing that Richards desired and intended to

have appellants understand and believe that he was solicitous in good faith for their interests and rights, and that prejudice to them would not be permitted by him to intervene until they could secure from him the date of the hearing and arrange to appear and be represented. The substance of the petition in this regard is that appellants moved promptly as to this upon receipt of his letter. His silence to the request of their letter for information, and his failure to supply it or to delay the hearing, strengthens the conclusion that his letter to them was intended to cause inaction on their part until he could and did secure the probate of the will. The incomplete information given and the omissions of Richards are the "very little" mentioned in the Krause case that is sufficient to affect and make inapplicable the principle that he was under no obligation to appellants, and are the things that misled them and resulted in their failure to present their case at the time of the hearing of the petition for the probate of the will or to seek and obtain a postponement of the hearing until they could reasonably prepare and present their contentions at a later time. These constituted extrinsic fraud. United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, defines extrinsic fraud as follows: "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court * * * or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff * * * these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." See,

also, Purinton v. Dyson, 8 Cal. 2d 322, 65 P. 2d 777, 113 A. L. R. 1230; Laun v. Kipp, 155 Wis. 347, 145 N. W. 183, 5 A. L. R. 655; Larrabee v. Tracy, 21 Cal. 2d 645, 134 P. 2d 265; Keane v. Allen, 69 Idaho 53, 202 P. 2d 411; Jones v. Arnold, 359 Mo. 161, 221 S. W. 2d 187; Hewitt v. Hewitt, 17 F. 2d 716; State v. Vincent, 152 Or. 205, 52 P. 2d 203; Annotation, 88 A. L. R. 1201.

Richards become executor of the will and estate of the deceased on November 3, 1950. He was then executor, attorney for the estate, and the principal legatee and devisee of the deceased. There was then a fiduciary relationship between him and the estate of the deceased, her heirs and beneficiaries, and all persons interested therein. The statute of this state providing for the appointment of an executor recognizes that an executor is a trustee to execute a trust by this language: "* * * the county court shall issue letters testamentary thereon (a probated will) to the person named executor therein, if he is legally competent, and he shall accept the trust * * *." § 30-302, R. R. S. 1943. The personal representative of an estate and his attorney are officers of the court and both are fiduciaries in their relation to persons entitled to share in the estate of the deceased. In re Estate of Blochowitz, *supra;* Meade v. Vande Voorde, 139 Neb. 827, 299 N. W. 175, 137 A. L. R. 554; In re Estate of Rhea, 126 Neb. 571, 253 N. W. 876. See, also, Fidelity & Deposit Co. v. Lindholm, 66 F. 2d 56, 89 A. L. R. 279; In re Estate of Willenbrock, 228 Iowa 234, 290 N. W. 502; Reconstruction Finance Corp. v. Lee, 290 Mich. 328, 287 N. W. 757; 33 C. J. S., Executors and Administrators, § 142, p. 1099.

The status of Richards as a trustee required him to make a full disclosure of all facts within his knowledge which were material for appellants to know for the protection of their interest, if they desired to contest the will of the deceased and acted timely after receipt of the information from the trustee. In Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393, it is said: "It is the

duty of a trustee to fully inform the cestui que trust of all facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material to the cestui que trust to know for the protection of his interests."

This obligated Richards when he became executor and was the attorney for the estate to advise appellants, at least, of the fact and the date of the probate of the will of the deceased; the time allowed for and the manner of taking an appeal to the district court from the decree of probate of the county court; that a new and complete trial in reference to the validity of the will of the deceased could be had in the district court; and that he had prepared the will and the facts concerning the making and execution thereof as he claimed them to be. He was also duty bound to correctly give any information he had concerning the will and the estate of the deceased on request of appellants. His default in these respects constituted a breach of his trust and a fraud on appellants. The court said in Rettinger v. Pierpont, *supra:* "Every violation by a trustee of a duty required of it by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust." See, also, Larrabee v. Tracy, *supra;* Jones v. Arnold, *supra;* 23 Am. Jur., Fraud and Deceit, § 81, p. 858.

The equity powers are ample, independently of statute, to set aside a probate procured by fraud. In In re Estate of Jensen, 135 Neb. 602, 283 N. W. 196, this court said: "* * * the statute enumerating grounds upon which a judgment may be vacated after term does not provide an exclusive remedy, but such grounds are concurrent with independent equity jurisdiction. * * * since the county court has exclusive original jurisdiction in probate matters, it has ample power to set aside probate decrees procured by fraud, independent of statute * * *." The Supreme Court of the United States in

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238, 64 S. Ct. 997, 88 L. Ed. 1250, said on this subject: "From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. * * * This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule."

Appellees rely strongly on Miller v. Estate of Miller, 69 Neb. 441, 95 N. W. 1010; In re Estate of House, 129 Neb. 838, 263 N. W. 389; and In re Estate of Reikofski, 144 Neb. 735, 14 N. W. 2d 379. The facts of each of those cases make them unimportant in the consideration and decision of this case. The facts alleged in the petition exempt appellants from a conclusion of negligence and an absence of diligence contributing to the entry of the decree of probate of the will from which they now seek relief.

The judgment sustaining the demurrers of appellees to the petition of appellants and dismissing the petition should be and it is reversed. This cause should be and it is remanded with directions to the district court of Deuel County to overrule the demurrers of appellees to the petition and to proceed further as provided by law.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGIANA G. MASTERS, APPELLANT, V. CLARENCE E. MASTERS, APPELLEE.
52 N. W. 2d 802

Filed April 4, 1952. No. 33138.

1. Divorce. The right to receive alimony, payable in monthly installments, and the corresponding duty to pay it, being personal, are generally considered as terminating on the death of either of the parties, where no statute to the contrary exists and the judgment or decree is silent on the subject.
2. ———. A judgment for alimony in general terms requiring payments of $50 a month, until further order of the court, terminates on the death of the husband, where there are no directions or circumstances indicating an intent to provide for payments after his death.

APPEAL from the district court for Dawes County: EARL L. MEYER, JUDGE. *Affirmed.*

*Edwin D. Crites* and *Albert W. Crites,* for appellant.

*Greydon L. Nichols,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

The plaintiff filed an application in the district court for Dawes County to revive a judgment entered in her favor in a divorce action. The second wife of the defendant Clarence E. Masters, deceased, as executrix of his estate, appeared specially, objecting to the jurisdiction of the court over the subject matter of the action. Two claims were filed by the plaintiff in the estate matter, one for monthly installments in arrears to the date of death of Clarence E. Masters, which payments were made by the executrix and the claim settled. The second claim is a contingent claim for alimony payments in monthly installments to be paid out of the deceased's estate for and during the natural life of the plaintiff. The trial court, after hearing had, sustained the special appearance of the executrix. The plaintiff filed a mo-

tion for new trial which was overruled. From the order overruling the motion for new trial, the plaintiff appeals.

It appears from the record that the plaintiff Georgiana G. Masters and Clarence E. Masters were married on July 1, 1901. The children of the parties have reached their majority and are self supporting, so no minor children are here involved. The plaintiff obtained an absolute divorce from the defendant on October 12, 1933. In the decree the following is stated: "And it is forther (further) ordered, adjudged, considered and decreed by the Court that under the property settlement heretofore made between plaintiff and defendant, which is hereby confirmed by the Court, there is hereby set over to the plaintiff as her sole and absolute property, the homestead, (which is described) * * * (subject to existing encumbrances), and all the household furniture * * * and * * * effects, and that defendant pay to the plaintiff as alimony, the sum of fifty dollars ($50.00) per month on or before the 15th day of each month, beginning on the 15th day of October, 1933, and until the further order of Court, * * *."

When the plaintiff and defendant were married, he was engaged in the watch-repair business, having a space in his uncle's drug store at Crawford, Nebraska. The plaintiff taught music in the public schools. Through the plaintiff's efforts and with some money that she had, they expanded the business to include jewelry. Subsequently the defendant took a course in optometry, returning to Crawford to practice his profession, where he remained for a while. He thereafter believed that Chadron, being without an optometrist, would afford him many more advantages. He went to Chadron and opened an office there, leaving the plaintiff to believe that the family would move to Chadron. Instead, he desired her to get a divorce, which she did on October 12, 1933. The record does disclose that through her efforts she was of great help and benefit to the defendant in his business and in getting a start in his profession.

In July of 1934, the defendant married Bernice E. Masters. At that time she was living with her mother, and working. She and the defendant lived in the mother's home until the mother passed away. At that time defendant's wife bought out the other heirs and became the sole owner of the real estate. She had previously, by inheritance, received a farm from her father. She loaned her husband money on occasions to help him build a new office and procure an automobile after his car had been taken from him by his first wife. In addition, a friend of hers loaned the defendant some money for the purpose of procuring a new office. Through their joint efforts they created an estate, the exact amount of which is not reflected in the record, but of a modest sum. At the time of defendant's marriage to his second wife he had no property other than the income received from his earnings from which he was obligated to pay the monthly alimony installments to the plaintiff. Defendant died on October 3, 1948.

The question presented in the instant case may be summarized as follows: Does the judgment of the district court, as a part of a decree of divorce obtained by a wife against her husband, which provides for the payment of a fixed monthly sum, as alimony, until further order of the court, automatically abate upon the death of the husband so as to release his estate from any further obligation to make the payments, even though the court has never entered a further order with respect to them? This precise question has not been previously before this court.

The plaintiff assigns as error that the order of the trial court was contrary to the evidence and to the law.

The following authorities are pertinent to a determination of this appeal.

In Metschke v. Metschke, 146 Neb. 461, 20 N. W. 2d 238, the wife was awarded $8,000 alimony payable $300 semiannually, requiring more than 13 years to complete the payments. It developed that in order to complete

the payments the husband would have to live out his life expectancy. The court said: "In considering small payments of alimony extending over many years, there are cases in which this may be a proper solution for the payment of alimony, but 'Generally, we do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time.' Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51. See, also, Martin v. Martin, 145 Neb. 655, 17 N. W. 2d 625." This court disapproved the decree providing for payments of alimony long past the natural expectancy of life of one who is to provide such payments.

In the case of DeWaal v. DeWaal, 148 Neb. 756, 29 N. W. 2d 371, the court said: Great latitude is allowed the trial court under section 42-318, R. S. 1943, not alone in fixing the amount of alimony, but also in determining the manner of its payment. The court may provide that, in case of the death of the wife, the husband's estate shall only be liable for a definite amount. The wife was granted alimony of $6,500, payable at the rate of $60 a month, requiring a little over 9 years to complete the payments, but in case of the prior death of the wife, payment of installments not due should terminate, and in case of the prior death of the husband then his estate should be liable for a maximum of $5,039.74 as alimony. It will be observed that the decree specifically provided how the payments should be made and the liability of the husband for such payments determined therein. This court has taken the position that the trial court should be free to fix the amount of alimony and how it should be paid. The decree may provide that upon the death of the husband his estate may be held liable for a less amount, as in the case at bar; it being understood that any monthly payments of alimony which might be in default upon the date of death of the wife must be paid in full. See, also, Met-

schke v. Metschke, *supra;* Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51.

The foregoing-cited authorities of this state clearly indicate that in a decree of divorce where the parties contract or stipulate, or the court so determines, installment payments of alimony may be incorporated therein to be paid out of the estate of the husband, but not otherwise.

"The right to receive alimony and the duty to pay it are generally considered as terminating on the death of either of the parties where no statute to the contrary exists and the decree is silent on the subject, although the courts generally have the power to provide for the continuance of alimony after the husband's death." 27 C. J. S., Divorce, § 240, p. 999.

There are a number of cases which take the view that, in absolute divorce, a provision for regular, periodical payments to the wife for her maintenance and support should not relate to periods after the death of the husband; or, at least, that the presumption is that such a provision will not embrace such periods unless they are specifically included. See annotations to 18 A. L. R. 1040 and 101 A. L. R. 323. The court considers that in the absence of disclosing intention, alimony does not survive the former husband's death.

In Lennahan v. O'Keefe, 107 Ill. 620, the decree with reference to annual payments provided the husband was required to pay his wife $400 per annum, payable semi-annually, as alimony, until the further order of the court. It was held that under the reservation in the decree giving alimony, as well as under the statute, the court was authorized to declare the alimony terminated, that is, it abated upon the death of the husband. See, also, Stahl v. Stahl, 114 Ill. 375, 2 N. E. 160.

Alimony decreed upon the dissolution of a marriage, if payable in installments, is, unless otherwise specially provided, an allowance for the support of the beneficiary during the joint lives of herself and her

divorced husband. See, Craig v. Craig, 163 Ill. 176, 45 N. E. 153; Maxwell v. Sawyer, 90 Wis. 352, 63 N. W. 283; Wallingsford v. Wallingsford, 6 Harr. & J. (Md.) 485.

Other cases take the view that whether a provision for periodical payments to the wife in absolute divorce, for support and maintenance, abates on the husband's death or not, depends upon circumstances. This is referred to as the broader view. We see no necessity to separately cite cases adopting the broader view as some of them appear in the following cited cases.

In Murphy v. Shelton, 183 Wash. 180, 48 P. 2d 247, the court held: "A judgment for alimony in general terms requiring payments of $50 a month, without specifying the period of the payments, terminates on the death of the husband, where there are no directions or circumstances indicating an intent to provide for payments after his death." See, also, Roberts v. Higgins, 122 Cal. App. 170, 9 P. 2d 517; Miller v. Superior Court, 9 Cal. 2d 733, 72 P. 2d 868; Borton v. Borton, 230 Ala. 630, 162 So. 529, 101 A. L. R. 320; Storey v. Storey, 125 Ill. 608, 18 N. E. 329, 1 L. R. A. 320, 8 Am. S. R. 417.

In the instant case the property settlement of the parties was agreed upon by them. The trial court, after considering the circumstances, confirmed this agreement and decreed judgment accordingly. It is obvious that the intention of the plaintiff and defendant, at the time they negotiated the property settlement in the divorce action, was that the installments of $50 a month were to be paid out of the income derived by the defendant from his profession. He had no other property. The trial court apparently understood and recognized the fact as evidenced by the decree.

The plaintiff claims, in an affidavit appearing in the record, that the defendant was to pay her $50 a month alimony which would be increased to $100 a month when his income and business had progressed to the extent that it was warranted, and that such amounts would

be paid during the natural life of the plaintiff. However, she made no effort, from the date of the rendition of the decree in her divorce action in October 1933, to attempt to have the decree modified to include what she claimed. The defendant died on October 3, 1948, and at that time the alimony payments were in arrears $1,243.37, which clearly indicates that the plaintiff, for a period of at least two years prior to defendant's death, was not interested in securing a modification of the decree.

Under either view, whether the same be called a restricted view as some of the cases indicate or the broader view, the plaintiff, under the circumstances of this case, would not be entitled to the relief she seeks.

We conclude the trial court did not err in sustaining the special appearance of the executrix of the estate of Clarence E. Masters, deceased, and the judgment of the trial court should be and is hereby affirmed.

AFFIRMED.

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JOSEPH J. ROSSBACH, APPELLANT, V. JOHN L. BILBY, APPELLEE.
52 N. W. 2d 747

Filed April 4, 1952. No. 33143.

1. **Appeal and Error.** This being an equitable action it will be tried de novo in this court pursuant to section 25-1925, R. R. S. 1943, and we will reach an independent conclusion without referring to the findings of the district court; subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Joint Adventures.** To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over

the agencies used therein, though one may entrust performance to the other.

3. ———. More convincing evidence is required to prove existence of a joint adventure where alleged joint adventurers are the only litigants than where the controversy is between a third party and the joint adventurers.

4. ———. Evidence examined and found insufficient to establish a joint adventure.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

*Paul I. Manhart* and *Henry C. Winters,* for appellant.

*Fred N. Hellner,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

Joseph J. Rossbach, plaintiff, brought this action against John L. Bilby, defendant, in the district court for Douglas County to establish an oral agreement of a joint adventure between the plaintiff and defendant for the purpose of dealing in and supplying stone to purchasers who might require such product, for an accounting and determination of the rights of the parties, and for damages. Trial was had to the court. The court rendered judgment, finding generally in favor of the defendant and against the plaintiff. The plaintiff did not file a motion for new trial. Plaintiff appeals.

For convenience we will refer to the parties as they appear in the district court, and in some instances by their last names as a matter of clarity.

The principal assignment of error contended for by the plaintiff is that the trial court erred in holding the plaintiff had not proved his oral contract to establish a joint adventure as pleaded in his petition, and in dismissing the plaintiff's cause of action at plaintiff's costs.

This action being equitable in nature comes under the provisions of section 25-1925, R. R. S. 1943, and is

here for review de novo. Byram v. Thompson, 154 Neb. 756, 49 N. W. 2d 628.

The evidence on many material questions of fact is conflicting. This is particularly true with regard to the testimony of the plaintiff and defendant. The record presents a factual situation to which the following is applicable: "This being an equitable action it will be tried de novo in this court pursuant to section 20-1925, Comp. St. 1929, and we will reach an independent conclusion without referring to the findings of the district court. Subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393. See, also, Byram v. Thompson, *supra*.

The plaintiff not having filed a motion for new trial, this court has jurisdiction and authority to try the case de novo on its merits in the manner provided by section 25-1925, R. R. S. 1943, but in the absence of a motion for new trial timely filed, it cannot review, consider, or pass upon errors of law which occurred during the trial. See Molczyk v. Molczyk, 154 Neb. 163, 47 N. W. 2d 405.

"A joint adventure is a legal relation of recent origin created by the American courts and is generally described as an association of persons to carry out a single business enterprise for profit." 48 C. J. S., Joint Adventures, § 1, p. 801.

"Although it has been held that a joint adventure and a partnership are separate legal relationships, it has also been held that they are governed by the same rules of law. The principal difference is that a joint adventure is usually, but not necessarily, limited to a single transaction." 48 C. J. S., Joint Adventures, § 1, p. 806. It is in the nature of a limited partnership.

See, Bank of Cedar Bluffs v. LeGrand, 127 Neb. 183, 254 N. W. 892; Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368. It can only exist by the voluntary agreement of the parties to it; nor can it arise by mere operation of law. It is said to exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly, but engage in a common enterprise for their mutual benefit. Bosteder v. Duling, 117 Neb. 154, 219 N. W. 896; Soulek v. City of Omaha, *supra.*

The existence of a joint adventure is a question of fact under the evidence, and further, more convincing evidence is required to prove existence of a joint adventure where alleged joint adventure parties are the only litigants than where the controversy is between a third party and the joint adventurers. The burden of establishing the joint adventure is on the plaintiff. See, Baum v. McBride, 143 Neb. 629, 10 N. W. 2d 477; Soulek v. City of Omaha, *supra.*

To constitute joint adventure there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other. See Soulek v. City of Omaha, *supra.*

The question presented in this appeal is whether or not a joint adventure existed.

With the legal principles set forth in the foregoing authorities in mind, we proceed to a review of the evidence.

The record shows that Rossbach, the plaintiff, a resident of Omaha since 1906, operated the Nebraska Stone Company, a corporation, for 30 years. Rossbach testified that sometime in April 1948, he was in the office of one Harry Stitt, a brother-in-law of the defendant Bilby, when the defendant came in and inquired of him

what he was doing, to which he replied: "Not much of anything, I am selling building material." The defendant then said: "Why don't we go into the stone business?" The plaintiff replied: "That is an idea." On May 4, 1948, the plaintiff was in the same office when the defendant came in. The defendant said to Stitt: "Harry how much do you want for this office?" Stitt had a vacant room in the building. Stitt said: "Who wants to know?" The defendant said: "* * * Rossbach and I want to go into the stone business, and we want an office." Stitt replied: "* * * I wouldn't rent it to anybody, but as a favor I will rent it for $25.00." Nothing further happened until June 12, 1948, and the plaintiff called the defendant to find out if he had given up the idea. The defendant said he would see him Sunday, so the plaintiff went to see the defendant on Sunday, June 13, 1948. Rossbach testified further that they had a conversation with reference to going into business. Bilby told the plaintiff to come to his store yard the next day at 9 a. m., which plaintiff did. Bilby was not there but telephoned to tell plaintiff that he was busy and would call later, which he did not do. On June 20, 1948, plaintiff went to Bilby's house. Bilby was favorable to making further arrangements. He said he would put up $5,000, and he wanted 5 percent return on his money, plaintiff was to take the rest. Plaintiff said that was a fair proposition. Plaintiff was to manage the stone business and, in addition, undertake the bookkeeping for such business and defendant's contracting business. Plaintiff told the defendant he would draw $50 a week for doing the bookkeeping, which was aside from the management of the stone business. They agreed to go into the stone business at that time. Defendant insisted on 5 percent return on his money. Rossbach said that going in on a fifty-fifty basis would be better, and instead of plaintiff operating the business alone defendant should protect his interest and see what was going on, and what the money was spent for.

Defendant asked Rossbach what assurance he had that plaintiff would remain with the business. Plaintiff told him that it was understood that he was going into the stone business as a permanent venture. They agreed to go into the business for a year and at the end of that time if it was successful they would incorporate. On June 21, 1948, plaintiff went to the defendant's construction yard. There was no building for an office and defendant asked plaintiff to inquire of the Reed Ice Cream Company to see if one of their vacant buildings could be procured. Nothing further was said or done. On July 8, 1948, defendant called plaintiff about the Reed building. Plaintiff told him that they could not procure space there. Plaintiff also told defendant he had another chance to go into business and he wanted to know if they were going ahead with the stone business. Defendant said they were. Nothing further occurred during the summer. On September 14, 1948, the parties went to a place where an office was being built by the defendant. Plaintiff told the defendant it was not large enough, but defendant said it was. Defendant then wanted to know what name should be used in the business. Rossbach told defendant they would take the name "Nebraska Stone Supply Company," not the Nebraska Stone Company. They agreed on that. Rossbach's name was synonymous with the Nebraska Stone Company. The matter continued along until the defendant called plaintiff on October 13, 1948. He informed plaintiff that he knew where some stone could be sold, and asked plaintiff to contact the party which he did and made the sale. The office was completed, and Rossbach started to work. They concluded they needed some furniture which plaintiff furnished and put in the office. They then started operation. Stationery was prepared, and they advertised "thirty years of experience in every phase of the stone industry" in letters signed by J. J. Rossbach which were sent out to the trade in which they explained their

line and business under the name of Nebraska Stone Supply Company.

About June 20, 1949, Bilby called in Mrs. Futcher to take over the bookkeeping, and told plaintiff to go out and sell stone. Then, during the morning of August 12, 1949, Bilby called Rossbach into the office and said: "I don't want you any more," and told him they were through.

On cross-examination the plaintiff testified that he was an employee of the defendant only to the extent of the bookkeeping arrangement. He was noted on the payroll of the company as an employee; likewise, he was noted on the social security records as an employee, and paid the social security premium required of him. On August 2, 1949, he signed a statement prepared by Mrs. Futcher wherein he was reimbursed for two trips made in behalf of the company, for a desk which was purchased from him, and his salary to date based on $50 a week. When he left the office he made no statement to defendant that he was a partner or engaged in a joint adventure, and that he was not subject to have his services terminated. Further, when Mrs. Futcher took over the bookkeeping in June, he continued to draw his weekly salary of $50 until such time as he signed the release. At that time he was engaged in teaching the men how to handle the saw to cut stone, and other matters which were not incident to management of the business.

Bilby testified that he was acquainted with the plaintiff for a number of years, and met him on the dates as testified to by him, as near as he could remember. Prior to meeting the plaintiff he had engaged to some extent in the stone business, and was jobbing stone as well as being engaged in the construction business. His business had increased to the extent that he and his wife were required to work on the books at night, to enable him to make his estimates and do work incident to his business in the daytime. He owned a lot and yard at 3730 Lake

Street, which is now a stoneyard. He testified that he was down there working one day when the plaintiff came over to the yard. The plaintiff had been endeavoring to get some office space from Stitt who had divided the space in his building. The plaintiff at that time had an architect with him. He told the defendant that the architect wanted him to sell stone on commission, but he did not want to. Bilby further testified that Rossbach asked him why he did not go into the stone business instead of jobbing stone. He told plaintiff the only reason he would go into that business in a large way, or build an office, was to make an arrangement so that his books could be taken care of and he could carry on the work of the construction company in the daytime. Rossbach said he would certify to the public as a bookkeeper and that he could take care of the defendant's books, with the amount of business he transacted, in 15 minutes a day. They dropped the subject. Rossbach called at Bilby's home on different occasions in the morning, evening, and on Sunday, urging him to go ahead and build an office and go into the stone business instead of jobbing stone, which he finally did.

With reference to the employment of Rossbach, Bilby testified that Rossbach said he was selling some kind of special line that took him out on the road once in a while and he was getting pretty old for that sort of work. His car was practically worn out, and he wanted to get something to do in town. He agreed to go to work for Bilby for $50 a week. He was to take care of the books of the construction company, manage and operate the stoneyard, and go out and sell stone. It was to be Bilby's stone business. The defendant denied entering into any partnership arrangement or joint adventure with the plaintiff, or that he would take the plaintiff into the business and share the profits. He testified that they were to try out the arrangement for a year. There was no mention of incorporating. Rossbach sold some stone before reporting to work, and sold some after he

took the job. Bilby further testified that he was unable to get Rossbach to go out and sell stone, and that he would not call on the list of prospects they had. On August 1, 1949, Bilby gave Rossbach a list of people to call on, and he did not call on them. About 10 o'clock the morning of August 2, 1949, Rossbach was not at the office. Bilby called him in and asked him for his keys, and told him "* * * you are through; you are fired." He replied "You have not heard the last of it." He then signed a statement prepared by Mrs. Futcher in full for his salary through August 2, and other items, although Rossbach testified that he was discharged on August 12, 1949.

Bilby further testified that he had met Rossbach in Stitt's office many times. He had no conversation with Rossbach in Stitt's office about going into the stone business. Stitt and an architect were considering going into the business and wanted Rossbach to work for them on a commission. Bilby also testified that he did not agree to put in any certain amount of capital; that he did borrow $4,000 at one time, $2,000 of which was used in the construction business and $2,000 in the stone business; and that the stone company paid the interest on its loan to the bank. He had as high as $15,000 in the stone business at one time. He denied suggesting the use of the name Nebraska Stone Company or Nebraska Stone Supply Company. He testified that when he asked Rossbach "How are we doing?" he used the term "we" without any particular significance. He did talk to Rossbach about purchasing a saw that could be used in the business. It was impossible for him to tell by Rossbach's books the status of the business, and he noticed that the entries by the plaintiff were not kept up, but appeared up to February 1, 1949. As a result he obtained the services of Mrs. Futcher to keep the books.

The defendant's wife testified that on several occasions Rossbach came to their home to see the defendant. She was under the impression that he was seeking

employment. It was a task for her to keep the books and tend to her family obligations. She kept the social security records until Mrs. Futcher took over the bookkeeping. She still did some book work at the office, and it was apparent to her that Rossbach resented her coming to the office.

Harry W. Stitt testified that he believed Rossbach worked for Bilby doing book work either in 1948 or 1949; that no conversation was had in his presence with reference to Rossbach and Bilby going into the stone business at any time; and that he remembered that they wanted to rent a building and he told them they could have the space in his office for $25 a month.

From an analysis of the evidence, and in the light of the authorities heretofore cited, we conclude that the evidence is insufficient to establish a joint adventure. Other assignments of error need not be discussed. The decree of the trial court should be, and is hereby, affirmed.

AFFIRMED.

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EUGENE RAMSEY, APPELLANT, V. KRAMER MOTORS, INC., A CORPORATION, ET AL., APPELLEES.
52 N. W. 2d 799

Filed April 4, 1952. No. 33153.

1. **Workmen's Compensation.** In a workmen's compensation case the insurance carrier is bound by a judgment against the insured whether the carrier is a party to the action or not.
2. ———. The provision of the workmen's compensation law which makes the contract of an insurance carrier a direct promise enforceable in the name of one entitled to compensation benefits effectually makes of the carrier a proper party defendant in an action to recover benefits.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

*Hans J. Holtorf* and *Robert M. Harris*, for appellant.

*Lovell & Wiles,* and *Mothersead, Wright & Simmons,* for appellees.

Heard before MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Eugene Ramsey, plaintiff and appellant, against Kramer Motors, Inc., a corporation, Fireman's Fund Indemnity Company, incorporated, and Western Casualty and Surety Company, incorporated, defendants and appellees. The action is for the recovery of benefits which plaintiff claims are due him from the defendant Kramer Motors, Inc., his employer, under the workmen's compensation law. The date of the alleged accident which is the basis of the action is uncertain. The evidence indicates an occurrence at some time between July 25, 1950, and a date near November 6, 1950. The defendant Western Casualty and Surety Company was the workmen's compensation insurance carrier for Kramer Motors, Inc., to October 23, 1950, at 12:01 a. m. The defendant Fireman's Fund Indemnity Company was the compensation insurance carrier thereafter. Because of the uncertainty of the date of the alleged accident the two carriers were made parties defendant in the action. Hereinafter when the defendants are not mentioned together Kramer Motors, Inc., will be referred to as the defendant, Western Casualty and Surety Company as Western, and Fireman's Fund Indemnity Company as Fireman's.

The action was first tried before a single judge of the workmen's compensation court. An award was there made in favor of plaintiff. An appeal was taken from this award to the district court. The action was tried in the district court de novo. Following the trial the award of the workmen's compensation court was set aside and a judgment rendered dismissing plaintiff's petition with prejudice. From this judgment the plaintiff

has appealed. This judgment was dated September 10, 1951, and filed September 11, 1951.

The journal entry contained no findings except a general one in favor of defendants.

On motion of Western, which motion was filed November 13, 1951, the district court on November 13, 1951, by order made a nunc pro tunc finding as of September 10, 1951, that the alleged accident which is the basis of the action occurred on or about November 6, 1950.

Western and Fireman's were not parties to the action in the workmen's compensation court. They were made parties by order of the district court filed July 16, 1951, pursuant to request of the defendant. No objection to the application for and no exception to this order was taken at the time. The first exception thereto appears in the motion for new trial.

The plaintiff seeks a reversal on four grounds. He says (1) that the court erred in causing Western and Fireman's to be made parties defendant; (2) that the court erred in failing to find that plaintiff's disabilities were the proximate result of an accident arising out of and in the course of his employment; (3) that the court erred in not making findings to support the judgment; and (4) that the court erred in excluding testimony as to the nature and extent of plaintiff's injuries.

As to the first, plaintiff contends that he was required to meet three defendants instead of one and was thereby prejudiced. We pass over the question of the timeliness of the objection and limit our consideration to its merits. He points to no authority the effect of which is to say that these two companies were not, as to his alleged cause of action and his evidence in support thereof, proper parties defendant.

His theory appears to be that they were not necessary parties, therefore they were not proper parties.

It is true that neither of them was a necessary party. The workmen's compensation law clearly so indicates.

The workmen's compensation insurance carrier is bound by a judgment against the insured whether the carrier is a party to the action or not. In this connection section 48-146, R. S. Supp., 1951, contains the following: "* * * jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer, and * * * that the insurer shall in all things be bound by the awards, judgments, or decrees rendered against such insured."

Another provision of this same section of the statute makes a workmen's compensation insurer directly liable to an accidentally injured employee of the insured. In reference to the insurance contract the statute provides: "Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name."

The promise contemplated is of course to respond to liability proved to exist under the terms of the contract in an action by an employee against the insurance carrier of the employer. The statute makes of the insuring agreement a primary obligation of the insurer to the employee of the insured.

It ought not therefore to be said that where one who has by law been made to primarily assume an obligation with another such one is not a proper party to defend against enforcement of the obligation. We hold that Western and Fireman's were properly made parties defendant and that the first assignment is without merit.

The determination upon the second assignment requires an examination of the evidence.

As to what occurred as the basis of this action there is no substantial dispute. As to when it happened there is not dispute but uncertainty. The matters of major importance are the conditions which followed the occurrence and their cause or causes.

On some day between July 25, 1950, and about November 6, 1950, the plaintiff, an employee of the defendant, and another employee were engaged in unloading crated automobile motors from a truck. These

motors were estimated to weigh from 300 to 500 pounds. The height of the truck from which they were unloaded was about 3½ feet. The crated motors were between 3 and 3½ feet in length. No information as to the other dimensions appears. As the crates were unloaded it appears that their length was crosswise of the truck. The unloading was onto a truck placed below the point of unloading. This truck was about 6 inches in height. With plaintiff at one end and the other employee at the other the crates were removed from the motor truck and down to the other truck which was there to receive them. Whether they were lowered by being carried downward or not is not made clear. The record is that they were eased to the lower truck.

As a crate was being lowered plaintiff says that he felt pain in the middle of his back somewhat below his belt line. His description indicates that it was not severe pain. He and his fellow employee testified that at the time he called the attention of the fellow employee to the pain. There was no evidence that he was disabled at the time. Apparently one or more crates were thereafter unloaded. The incident was not mentioned again to anyone until much later. Whether or not he called the attention of anyone to the matter before November 27, 1950, is not certain. On November 27 he was hospitalized and at that time and thereafter his condition came under the attention of several doctors.

Two doctors on behalf of plaintiff described his condition as a herniated intervertebral disc between the fifth lumbar and the first sacral segments of the vertebrae with disability which need not be described here. One doctor on behalf of the defendants likewise described it, and also described an arthritic condition which he found in close proximity. He said however that there was no aggravation of the herniation by the arthritis.

Significantly while the evidence of these witnesses of plaintiff and defendants is in substantial accord that

plaintiff has a disability and as to its character, neither this evidence nor that of any other witness relates that disability, in the sense that it must be related to be subject to recompense under the workmen's compensation law, to the alleged accident of which plaintiff complains. None of these witnesses on the basis of a hypothesis or otherwise has testified directly or given it as his opinion that the herniation of this disc was produced or flowed from any accident occurring while plaintiff was in the employ of the defendant.

The court therefore could not properly do other than to fail to find that plaintiff's disabilities were the proximate result of an accident arising out of and in the course of his employment.

This conclusion renders unnecessary a consideration of the question of whether or not the occurrence complained of was an accident within the meaning of the workmen's compensation law.

The court found generally for the defendants and against the plaintiff. As is clear from what has already been said this was the only possible proper finding. It is true that there could have been elaboration but it is not pointed out how that could have been beneficial to plaintiff or failure in that respect could or did operate to his prejudice.

From an examination of the record in this case the findings of fact were the only ones which could have been properly made. They were consistent with and in support of the judgment. The third assignment is therefore without merit.

The fourth assignment challenges the propriety of the exclusion of the offered testimony of two doctors in explanation of the character and extent of plaintiff's injuries and disability on rebuttal.

Whether or not the rejection of the evidence thus offered on the basis of the objections made was error does not require consideration here. If it was error it was such without prejudice in view of the fact already

pointed out that there was an entire failure of proof of injury sustained by plaintiff in the course of his employment by the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

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HAZEL M. ANDERSON, APPELLEE, V. THE BITUMINOUS CASUALTY COMPANY, APPELLANT, THE STATE OF NEBRASKA, APPELLEE.
52 N. W. 2d 814

Filed April 11, 1952. No. 33126.

1. **Sheriffs and Constables.** Section 23-1704, R. S. 1943, gives a sheriff authority to call a private citizen into the service of the county to aid him for the purposes therein provided.
2. **Sheriffs and Constables: Counties.** When a private citizen is impressed into service by the sheriff for any of those purposes a contract of employment with the county results and the county so employing a citizen becomes liable to him for the reasonable value of the services he renders at the direction of the sheriff.
3. **Workmen's Compensation.** Any citizen so called into service who receives an injury which arises out of and in the course of such employment is entitled to compensation under the provisions of our workmen's compensation law.
4. **Officers.** A citizen who is actually called into service by the sheriff under the authority of this statute and assists him as a deputy under color of an appointment is such officer de facto, although his appointment was not made with the formalities required by statute.
5. **Appeal and Error: Workmen's Compensation.** Under the provisions of section 48-125, R. S. 1943, where an employer appeals to the Supreme Court from an award of the district court and fails to obtain any reduction in the amount of such award, the Supreme Court shall allow the employee a reasonable sum for attorney's fee for the proceedings in the Supreme Court.

APPEAL from the district court for Nemaha County: VIRGIL FALLOON, JUDGE. *Affirmed.*

*Kennedy, Holland, DeLacy & Svoboda, Edwin Cassem, Harry R. Henatsch,* and *Ferneau & Kiechel,* for appellant.

*Davis, Stubbs & Healey, Betty Jean Sharp,* and *Clarence S. Beck,* Attorney General, and *Clarence A. H. Meyer,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is a compensation claim instituted in the Nebraska Workmen's Compensation Court by Hazel M. Anderson, widow of William M. Anderson, deceased, against The Bituminous Casualty Company, a corporation, insurance carrier for workmen's compensation for the county of Nemaha, Nebraska, and the State of Nebraska. Claimant contends William M. Anderson, upon whom she alleges she was wholly dependent for support, died on May 14, 1949, as a result of injuries suffered on May 12, 1949, in the course of and arising out of his employment as a law enforcement officer of the county of Nemaha and the State of Nebraska. She asked that she be granted such relief as she was entitled to under the workmen's compensation law.

The district court for Nemaha County, on appeal thereto, found William M. Anderson died as a result of injuries suffered in the course of and arising out of his employment with Nemaha County as a deputy or assistant to the sheriff thereof; that claimant was the widow of decedent and wholly dependent upon him for her support; and that The Bituminous Casualty Company, being the insurance carrier of workmen's compensation for Nemaha County, was liable for such compensation as the county is obligated to pay. Based on such findings the court rendered a decree in favor of the claimant and against The Bituminous Casualty Company for payments in the sum of $22 per week for a period of 325 weeks starting on May 12, 1949, for medical and hospital expenses in the sum of $286, and for burial expenses in the sum of $250. Her claim against the State of Nebraska was dismissed.

The Bituminous Casualty Company, a corporation, filed a motion for new trial and, from the overruling thereof, took this appeal. Claimant has cross-appealed from that part of the decree dismissing her claim against the State of Nebraska.

While differently stated in the assignments of error, the question presented by this appeal is, was William M. Anderson at the time he was injured an employee of Nemaha County within the meaning of the Nebraska Workmen's Compensation Act?

For the purpose of determining this question we consider the record de novo. See Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212.

Admittedly, or without dispute in the evidence, the record discloses that William M. Anderson, who will hereinafter be referred to as decedent, and Hazel M. Anderson, claimant, were husband and wife and lived together in their home in Auburn, Nebraska; that claimant was wholly dependent upon decedent for her support; that they were respectively 53 and 52 years of age and had one son, Mac, Jr., age 27; that the decedent and his son, who will herein be referred to as the Andersons, operated a garage and machine shop in Auburn; that about a week before May 12, 1949, a Reverend Edward D. Byrd, who did not live in Auburn and was not known there, left a car in the Andersons' garage for the purpose of having some repairs made thereon; that for various reasons, not here material, the Andersons concluded that the car might have been stolen and therefore got in touch with Donald G. Grieb, a trooper of the Nebraska Safety Patrol, who was at that time stationed in Auburn and who will hereinafter be referred to as the patrolman; that the patrolman checked the car and discovered it had been stolen and requested the Andersons to get in touch with him whenever anyone came to get the car; that the Andersons called the patrolman on Wednesday, May 11, 1949, advising that the party was there to get the car; that the patrolman

and Harvey H. Kuenning, who was then sheriff of Nemaha County and who will hereinafter be referred to as the sheriff, proceeded to the Andersons' garage where they found a party of four who had come to get the car; that out of the group of four the officers arrested Reverend Byrd and he was turned over to the sheriff who placed him in the county jail in Auburn; that sometime before 8 a. m. the next morning, which was Thursday, May 12, 1949, by use of a dummy, Byrd tricked the sheriff and managed to escape from the jail; that the sheriff, upon being released by his wife, having been locked in a jail cell by the prisoner, called the patrolman; that the patrolman immediately reported to the jail; that after a brief discussion with the sheriff the patrolman called decedent; that in response to the call the Andersons reported to the jail and joined in the hunt for the escaped prisoner; that the Andersons continued in that search throughout the day and into the night; that in the evening decedent joined the patrolman and assisted him with a road block at a point on the highway about two miles north of Auburn; that sometime after 9:30 p. m. of that evening, while continuing to assist in conducting this road block, decedent was hit by a jeep and injured; and that, as a result of the injuries, he died on Saturday, May 14, 1949.

With reference to the sheriff having employed decedent to assist him in apprehending the escaped prisoner, we think the evidence, although somewhat in dispute, supports a finding as follows: That after the prisoner tricked the sheriff and managed to escape, the sheriff, upon being released from the cell by his wife, took immediate steps to retake the prisoner; that he called the patrolman, who responded; that after the patrolman arrived they discussed plans to get some help to search for the escaped prisoner; that the sheriff asked who the patrolman thought they could get; that the patrolman suggested the Andersons since they knew the prisoner, who was a stranger in Auburn; that the sheriff

suggested to the patrolman that he call the Andersons and have them come to the jail; that the patrolman called the Andersons, talking to decedent, telling him that Byrd had escaped and that they needed help in finding him; that decedent said they would be right up; that shortly thereafter the Andersons came to the jail; that the sheriff was present when they arrived; that they, including the sheriff, then discussed what they were going to do and the best way to do it; that all that day decedent joined in the search; that after supper, with the consent and approval of the sheriff, decedent joined the patrolman in maintaining a road block some two miles north of Auburn; and that while engaged in this work with one Elmer Chapp, who had replaced the patrolman when the latter was called into Auburn, decedent received the injuries which resulted in his death.

The evidence also shows that after his prisoner escaped the sheriff took full charge of trying to recapture him. That the sheriff thought it presented an emergency and that it was an urgent matter to retake the prisoner, which it was, is fully evidenced by what he did during the day. The sheriff not only called on the Nebraska Safety Patrol for help but put out a general alarm in the community, asked a National Guard unit, that was having a meeting, to join in the search, called on the police officers of Auburn for help, and formed a road block on the four highways out of Auburn, one in each direction, to prevent the escaped prisoner from getting out of the community by means of a car.

Section 48-115, R. S. 1943, of the Workmen's Compensation Act, insofar as here material, provides:

"The terms 'employee' and 'workman' are used interchangeably and have the same meaning throughout this act. The said terms include the plural and all ages and both sexes, and shall be construed to mean:

"(1) Every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, expressed or implied, oral or

written, but shall not include any official of the state, or any governmental agency created by it, who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term; * * *."

Section 23-1704, R. S. 1943, relating to the authority of sheriffs, provides: "The sheriff and his deputies are conservators of the peace, and to keep the same, to prevent crime, to arrest any person liable thereto, or to execute process of law, they may call any person to their aid; and, when necessary, the sheriff may summon the power of the county."

Under circumstances such as here, where a person under arrest had escaped and the sheriff was in charge of and organizing the search to retake him, we think, under this statute, the sheriff had authority to and was justified in securing the services of the Andersons, who knew the escaped prisoner, a stranger in the community of Auburn, on sight. This, the evidence establishes, the sheriff did and we find decedent, at the time of his injuries, was, at the request of the sheriff, assisting him in his attempt to retake Byrd who had, at the time decedent was injured, not been recaptured.

This same result has been reached in other jurisdictions under similar fact situations and like or comparable statutes. In Gulbrandson v. Town of Midland, 72 S. D. 461, 36 N. W. 2d 655, the South Dakota court said:

"The statutes clothe either a sheriff or a town marshal with authority to call a private citizen into the service of the county or town respectively. By SDC 12.1001 it is provided 'The sheriff shall keep and preserve the peace within his county, for which purpose he is empowered to call to his aid such persons or power of his county as he may deem necessary. * * *' And by SDC 45.1112 it is provided '* * * and each town marshal shall possess, within the jurisdiction of the municipality,

all the powers conferred by law upon sheriffs to suppress disorder and keep the peace.'

"We are of the opinion that when a private citizen is so impressed into service by a peace officer (cf. SDC 34.1618) a contract of employment results, and the county or town so employing a citizen becomes liable to him for the reasonable value of the service he renders by direction of such officer and therefore one who receives an injury which arises out of and in the course of such an employment is entitled to compensation as provided in the South Dakota Workmen's Compensation Law. Such is the current of authority in other jurisdictions. County of Monterey v. Rader, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359; Tomlinson v. Town of Norwood, 208 N. C. 716, 182 S. E. 659; Mitchell v. Industrial Commission of Ohio, 57 Ohio App. 319, 13 N. E. 2d 736; Millard County v. Industrial Commission, 62 Utah 46, 217 P. 974; Village of West Salem v. Industrial Commission of Wisconsin, 162 Wis. 57, 155 N. W. 929, L. R. A. 1918c, 1077; Vilas County v. Monk, 200 Wis. 451, 228 N. W. 591 and Balinovic v Evening Star Newspaper Co., 72 App. D. C. 176, 113 F. 2d 505.

"In writing of the cases we have cited supra, in Eaton v. Bernalillo County, 46 N. M. 318, 128 P. 2d 738, 742, 142 A. L. R. 647, Mr. Justice Sadler said, 'In each of the cases relied upon by appellee and cited, supra, the court was presented with facts affording jurisdiction (justification) to the sheriff, or his deputy, in impressing the service of a bystander in arresting, securing or conveying some dangerous character suspected of or charged with a violation of the criminal laws. Under such circumstances, it was logical to hold that the person injured while so assisting occupied the status of a deputy sheriff, and, hence, of an employee, thereby entitled him or his dependents, to compensation.' And again at a later point in that opinion in writing of the element of pay, it was said, 'It all comes back to the question whether the services of decedent

were commandeered. If so, then we may assume he would be entitled to the reasonable value of his services for the period employed, thus supplying the much discussed wage element.' "

As stated in Sexton v. County of Waseca, 211 Minn. 422, 1 N. W. 2d 394: "While there was no pressing emergency, yet under the general power of the sheriff to keep and preserve the peace of the county, to pursue and apprehend all felons, execute all process, etc. (Mason St. 1927, § 907), he had ample authority to engage a person to go with him in order that he might safely conduct his prisoner from Mobridge to Waseca."

And in County of Monterey v. Industrial Accident Commission, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359: "Clearly the deceased was in the service of the county of Monterey by the appointment of its sheriff, who was vested with power to confer upon the deceased the authority of a deputy sheriff or peace officer of said county. (Pol. Code, sec. 4157, subd. 5; Pen. Code, secs. 150 and 723.) The sheriff may, without organizing a formal posse comitatus, orally summon to his assistance any person when he deems it necessary to effect an arrest. (2 R. C. L., p. 491.) The person thus summoned has all the authority of a formally deputized officer in such matter, and is in fact a de jure deputy sheriff. The deceased was at the time he was slain in the service of the county under appointment by a county officer, to wit, the sheriff." See, also, Shawano County v. Industrial Commission, 219 Wis. 513, 263 N. W. 590; Mitchell v. Industrial Commission of Ohio, 57 Ohio App. 319, 13 N. E. 2d 736.

Decedent was not formally deputized; that is, he was not appointed and confirmed nor did he take an oath or give bond. While this fact is not particularly raised and discussed by appellant it does appear in the evidence and is mentioned as a fact in the brief. But this fact would not defeat recovery. Under situations, such as

here, it is seldom practical to go through these formalities.

As stated in Millard County v. Industrial Commission, 62 Utah 46, 217 P. 974: "* * * it is generally held that one who is actually acting as a deputy sheriff under color of an appointment is such officer de facto, although his appointment was not made with the formalities required by statute (35 Cyc. 1522), * * *." See, also, Vilas County v. Industrial Commission, 200 Wis. 451, 228 N. W. 591; Gulbrandson v. Town of Midland, *supra;* County of Monterey v. Industrial Accident Commission, *supra;* Village of West Salem v. Industrial Commission, 162 Wis. 57, 155 N. W. 929, L. R. A. 1918C 1077.

The cross-petition raises the question of whether or not decedent was also an employee of the State of Nebraska. We think the patrolman, in calling the Andersons to assist, was acting at the request of and in behalf of the sheriff, who was in charge of organizing the search, and not as a patrolman of the Nebraska Safety Patrol. Consequently we do not think the evidence sufficient to establish the relationship of employer and employee between the State of Nebraska and decedent even if the patrolman had authority to create such a relationship. In view thereof we will not discuss the patrolman's authority in that regard. We find the dismissal of the claim as against the State of Nebraska to be correct.

The claimant asks that if the appellant fails to obtain any reduction by reason of its appeal that she be allowed an attorney's fee in this court. Section 48-125, R. S. 1943, provides: "* * * In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the

employee a reasonable sum as attorney's fees for the proceedings in that court."

In Gilmore v. State, 146 Neb. 647, 20 N. W. 2d 918, we held: "Under the provisions of section 48-125, R. S. 1943, where an employer appeals to the Supreme Court from an award of the district court and fails to obtain any reduction in the amount of such award, the Supreme Court shall allow the employee a reasonable sum for attorney fees for the proceedings in the Supreme Court."

Considering the amount involved and the fact that the case is one of first impression in this court we think a reasonable attorney's fee to be the sum of $600 and the same is taxed as costs.

In view of what has hereinbefore been said we affirm the judgment of the district court and direct that all costs, including the attorney's fee allowed in this court, be taxed to appellant, The Bituminous Casualty Company, a corporation.

AFFIRMED.

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ED H. SCHRODER, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
52 N. W. 2d 808.

Filed April 11, 1952. No. 33129.

1. **Municipal Corporations: Nuisances.** The streets of a municipality in this state belong to the public and an unauthorized obstruction or encumbrance of them by a structure or otherwise constitutes a public nuisance.
2. **Nuisances.** A private individual may not maintain an action to prevent or suppress a public nuisance unless he will or has sustained some special injury therefrom distinct and different in kind from that which he will or does suffer in common with the rest of the public.
3. ———. A public nuisance, if committed without authority, can be remedied by a public prosecution or other available proceedings instituted by the proper officer on behalf of the people.

4. **Judgments.** The requisite precedent conditions of obtaining declaratory relief are: That a controversy exists in which a claim is asserted against one who has an interest in contesting it; that the controversy is between persons whose interests are adverse; that the parties seeking declaratory relief must have a legally protectible interest or right in the controversy; and that the issue involved is capable of present judicial determination.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Reversed and dismissed.*

*Flansburg & Flansburg, John E. Jacobson,* and *C. Russell Mattson,* for appellants.

*F. C. Radke,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is a suit for a declaratory judgment to determine the validity of a resolution of the council of the city of Lincoln.

The general demurrer of the National Bank of Commerce, and the separate general demurrer of the city of Lincoln, the mayor thereof, and members of the council to the amended petition of appellee were denied. They elected not to plead further and judgment was rendered as follows: That the action of the council of the city of Lincoln in adopting the resolution in question was ultra vires; that the resolution was void; and that the National Bank of Commerce obtained no rights, permission, or authority because of its adoption. The motion for a new trial of the city, its mayor, and members of the council and the separate motion of the bank were overruled. They appealed separately. There has been no brief filed by the city, the mayor, or council. The contending parties are Ed H. Schroder and the National Bank of Commerce. They will be designated as appellee and appellant respectively.

Appellee alleges that: He is a citizen of the United

States and of Nebraska; he is a resident of, owns property subject to taxation in, and is a taxpayer of Lincoln; he is an elector; and he owns and operates motor vehicles therein. As a citizen, elector, and taxpayer he is interested in keeping the streets and sidewalks free from public nuisances. He brings this action pursuant to the Uniform Declaratory Judgments Act in his own behalf and on behalf of all other persons similarly situated.

Lincoln is a city of the primary class, has a population of about 100,000 inhabitants, has a home rule charter, and the government thereof is vested in a council of seven members, one of whom is elected as mayor of the city. The National Bank of Commerce is a national banking corporation engaged in conducting a commercial banking business in a building owned by it at the northwest corner of the intersection of O Street with Thirteenth Street in the city of Lincoln. The building faces on O Street. Thirteenth Street was dedicated to the use of the public for travel and transportation at the time Lincoln was platted and incorporated.

Appellant requested permission of the city to erect, on the sidewalk north of O Street on the west side of Thirteenth Street near its west curb opposite the east side of the bank building, a curb teller machine for use of patrons in making deposits of money with the bank without entering its building, and also for a reserved area of three motor vehicle parking stalls adjacent to the curb on the west side of Thirteenth Street to enable persons riding in vehicles to approach, have access to, and the use of the machine without alighting from their conveyances.

The city council of Lincoln adopted, and appellant accepted and agreed to be bound by, a resolution permitting it to install and maintain, until otherwise ordered by the council, a curb teller machine described as about 1 foot 10 inches deep, 2 feet 1 inch in width, and 5 feet 8 inches in height in the sidewalk space above

indicated. The city did not grant the request of appellant for the use of reserved parking area in the street designated as three parking stalls near the location of the machine.

The city of Lincoln or its council had no power or authority to authorize anyone, natural or artificial, to use any part of any street or sidewalk for private business purposes or to erect, have, or maintain thereon or therein a curb teller machine or any other structure. The action of the council was ultra vires. The resolution conflicted with described ordinances of the city and is void, and the bank obtained no right or authority by it. The existence of the installation attempted to be permitted would be an illegal encroachment on and an obstruction of the public streets, and would constitute a public nuisance, purpresture, and an illegal invasion of the rights of the appellee and the public. It is the duty of the city to keep its streets and sidewalks free of all unlawful encroachments and obstructions. The rights, duties, and other legal relationships of the parties as affected by the resolution are involved herein, and the validity of the resolution is the subject of controversy between the parties to the case. The court was asked to adjudge the resolution invalid.

The objective of this litigation is an adjudication preventing the creation and continuance in Lincoln of an alleged public nuisance by the authority of and with the approval of the council of the city. The legal qualification and capacity of appellee to contest the action of the city officials in reference to this must be found, if at all, in the fact that he enjoys the status of a resident citizen, elector, taxpayer, and owner of property subject to taxation in Lincoln, including motor vehicles that he operates therein. The location of the property of appellee in the city is not given. Neither is it claimed that it, nor the use and enjoyment thereof, would be in any way interfered with, obstructed, injured, or damaged by the installation and operation of the machine by

the bank in accordance with the resolution adopted by the city. He relies for his legal capacity to litigate the legality of an official act of the city on the fact that he is a citizen, elector, and taxpayer and his interest in having the public ways of the city free from public nuisances. He does not allege any special interest, right in, or injury because of the subject of this cause different from that of any other member of the public. The allegation of his pleading that he brings this action on his own behalf and on behalf of all others similarly situated disputes and forecloses any claim of special injury of appellee peculiar to himself aside from and independent of the general injury to the public. Appellee cannot successfully oppose the resolution of the city council on the basis that the exercise of the permission given by it to the appellant will create and continue a public nuisance unless he pleads and demonstrates that the installation and maintenance of the machine in question will cause him some special injury different not only in degree but distinct, independent, and different as to kind than that suffered by the public.

The obstruction or encumbrance of a street in a city of this state by a structure or otherwise is a public nuisance unless it is authorized in a proper case by competent authority. Section 28-1016, R. R. S. 1943, contains this language: "* * * the obstructing or encumbering of (by) fences, buildings, structures or otherwise, any of the public highways or streets or alleys of any city or village, shall be deemed nuisances." In Bischof v. Merchants Nat. Bank, 75 Neb. 838, 106 N. W. 996, 5 L. R. A. N. S. 486, it is said: "Public highways belong, from side to side and from end to end, to the public, and any permanent structure or purpresture which materially encroaches on the public street and impedes travel is a nuisance per se; but in a proper case such obstructions may be authorized by competent authority." This language is used in the opinion: "That the stone and pillars of the new portico to the

bank building, as now remodeled, extend into the public street, is conceded; that such an obstruction constitutes a public nuisance is not only the doctrine of the common law, but falls within the statutory definition." See, also, City of Omaha v. Flood, 57 Neb. 124, 77 N. W. 379; World Realty Co. v. City of Omaha, 113 Neb. 396, 203 N. W. 574, 40 A. L. R. 1313.

One of the first reported decisions of this court concerned an attempt by a private individual to maintain an action to abate and prevent the continuance of a public nuisance. The doctrine was therein adopted, and has frequently since been approved and given full effect, that in cases of public nuisances a private individual has no right of action unless he suffers because thereof some peculiar or special injury not common to the general public. This rule is obviously applicable to proceedings for relief by a private person because of the obstruction of a street or highway. To qualify an individual in his private capacity to maintain an action of this character he must allege and establish some special or peculiar damage to himself because of the obstruction not common to the general public. In Kittle v. Fremont, 1 Neb. 329, this court said: "A common or public nuisance, if committed without lawful authority, can be remedied by a public prosecution instituted by the proper officer, on behalf of the people. * * * An individual who is specially injured by a common or public nuisance may maintain a suit to have the same abated. * * * But a private person cannot maintain an action to abate a public nuisance unless he can aver and prove some special injury to himself." It is stated in the opinion: "The plaintiffs sue on behalf of themselves and all others, the property holders of the town of Fremont. They do not pretend to have any interest in the subject matter of the suit, which is not common to all the other residents of the town, whether they be freeholders or not. * * * The pretended wrong of which the plaintiffs complain is the closing up of cer-

tain of the public streets and alleys, and the vacation of a portion of the public park. This is in the nature of a common or public nuisance, and if done without lawful authority, can be remedied by a public prosecution, instituted by the proper public officer, on behalf of the people. So, too, could a suit be maintained by any individual of the town in his own right who is specially injured thereby. * * * The plaintiffs are simply resident freeholders of the town of Fremont. They have no real estate bordering upon the park, or upon either of the streets affected by this change. They have sustained no special damage by reason thereof * * *. They present themselves before the court in the character of volunteer champions of the public interests * * *. Under these circumstances we are most clearly of the opinion that the plaintiffs show no such interest in the subject of this suit * * * as to enable them to maintain this action." In Hill v. Pierson, 45 Neb. 503, 63 N. W. 835, it is said: "It has been stated by this court that a public nuisance will be enjoined in a suit instituted by a private party for such purpose, but only when the plaintiff does or will sustain a special damage, a personal injury distinct from that which he suffers in common with the rest of the public * * *." In Powers v. Flansburg, 90 Neb. 467, 133 N. W. 844, the court said: "A private individual cannot maintain an action to suppress a public nuisance, unless he sustains some special injury caused thereby other than that sustained by the public at large." This appears in the opinion: "The petition does not allege any special interest of these plaintiffs in these proceedings, as distinguished from the interests of the general public. On the other hand, it is specifically alleged that this action was brought by these plaintiffs in their own behalf and in behalf of all the citizens of Trenton who, it is alleged, were similarly situated. Under these circumstances, it is clear that this action cannot be maintained." In Ayers v. Citizens Railway Co., 83 Neb. 26, 118 N. W. 1066, it

was said concerning the plaintiff: "It is a general rule that a public nuisance does not furnish grounds for an action in equity by an individual who merely suffers an injury which is common to the public. * * * The lines of street railway and poles and wires may inconvenience the plaintiff to a greater degree than the public generally; but the mere fact that plaintiff uses that street more frequently than others of the public and may suffer more from the alleged nuisance than others does not present a distinct injury. Her injury is the same in character as that which the public will suffer. The only difference is one of degree, and not of kind." See, also, Lee v. City of McCook, 82 Neb. 26, 116 N. W. 955; Gleason v. Loose-Wiles Cracker & Candy Co., 88 Neb. 83, 129 N. W. 173; Brown v. Easterday, 110 Neb. 729, 194 N. W. 798; Chizek v. City of Omaha, 126 Neb. 333, 253 N. W. 441; Kirby v. Omaha Bridge Commission, 127 Neb. 382, 255 N. W. 776; 66 C. J. S., Nuisances, § 78, p. 831; 39 Am. Jur., Nuisances, § 124, p. 378; 40 C. J. S., Highways, § 222, p. 219; 25 Am. Jur., Highways, § 315, p. 607.

The allegations of interest of appellee in this controversy are citizenship, being an elector, the owner of property, a taxpayer, and an operator of motor vehicles in the city of Lincoln. He does not show by his pleading wherein any of these interests are or could be injured by the construction authorized by the resolution. He has not shown that he has or can sustain a special damage or a personal injury distinct from that which he may suffer in common with the rest of the public.

Appellee lists many cases in support of his proposition of law that the rule that plaintiff, to be entitled to sue, must have sustained some injury to his personal or property rights does not prevent the bringing of an action which involves only the establishment of public rights. He, with entire disregard of the prohibition that no authority shall be cited under any proposition that is

not quoted from or otherwise discussed (Rule 8a 2(5), Rules of Supreme Court), notices only one in his argument. It is Zoercher v. Agler, 202 Ind. 214, 172 N. E. 2d 186, 70 A. L. R. 1232. It does not support to any extent his proposition. It is very definitely to the contrary. There were public rights in the case but the court said: "* * * at the same time, it is apparent that, as taxpayers of South Bend, their (the plaintiffs) personal and property rights are also involved and will be injured if a tax is illegally levied." There was an actual controversy relative to a property right of plaintiffs as taxpayers. The pertinent language in that case, when all of it is considered, amounts to a declaration that the fact that plaintiff must show injury to his personal or property rights to qualify him to litigate in reference to public rights, does not prevent him from maintaining an action because it involves public rights and also matters affecting adversely his individual property rights.

An action for a declaratory judgment must involve a justiciable controversy between persons whose interests are adverse. The plaintiff must have a protectible interest in the controversy and the issue involved must be appropriate for judicial determination. The statute provides: "Any person interested * * * whose rights * * * are affected by * * * municipal ordinance * * * may * * * obtain a declaration of rights." § 25-21,150, R. R. S. 1943. It grants the moving party an opportunity to have his own rights determined but not some other person's rights when his own are not invaded or disturbed. This court pointed out in Lynn v. Kearney County, 121 Neb. 122, 236 N. W. 192, that unless the act authorized a declaratory judgment in those cases only where litigable issues between proper parties were presented it would be unconstitutional as conferring nonjudicial functions on the court. It therein said: "Declaratory judgments act examined, and held to be applicable to actions wherein there is an actual controversy, and where only justiciable issues are presented

by proper parties. So construed, the act does not confer on the courts nonjudicial powers." State ex rel. Smrha v. General American Life Ins. Co., 132 Neb. 520, 272 N. W. 555, defines justiciable controversy in this language: "When a concrete, contested issue is presented * * * where there is a definite assertion of legal rights and a positive denial thereof, the required condition of being a justiciable issue is met." "Legal rights" referred to by the court must be the personal private rights of the party. Appellee has not pleaded that such rights of his are involved in this case. In the recent case of Miller v. Stolinski, 149 Neb. 679, 32 N. W. 2d 199, it was determined that the defendants had no interest in or duties to perform with regard to the act of the Legislature in question and that therefore there was no controversy presented by the case. In dismissing the action the court quoted Borchard, Declaratory Judgments (2d ed.), p. 76, as follows: "Actions for declaratory judgments brought by individuals to test or challenge the propriety of public action often fail on this ground, either because the plaintiff is deemed not to have an adequate personal interest in the issue, or because the public officer or other person selected as a defendant has no special interest to oppose the complaint or no special duties in relation to the matter which would be affected by any eventual judgment. The absence of adversary or the correct adversary parties is in principle fatal." The doctrine of that case is applicable to and controlling in this case. Appellee has no private property interest to protect, is not a proper party plaintiff in this case, and has no adequate personal interest in the issue involved which legally authorizes him to demand that the issue be adjudicated. Since he is not a proper party to the action he can present no justiciable controversy and is not entitled to seek a declaratory judgment. See, also, Banning v. Marsh, 124 Neb. 207, 245 N. W. 775; State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W.

2d 502; Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397; State of North Dakota ex rel. Strutz v. Perkins County, 69 S. D. 270, 9 N. W. 2d 500; Seiz v. Citizens Pure Ice Co., 207 Minn. 277, 290 N. W. 802; State ex rel. La Follette v. Dammann, 220 Wis. 17, 264 N. W. 627, 103 A. L. R. 1089; Dietz v. Zimmer, 231 Ky. 546, 21 S. W. 2d 999.

The gist of the question in a declaratory judgment suit to test action taken by a municipal corporation is whether or not the plaintiff has as an individual, a special, protectible right which is in controversy and which will be lost or prejudiced unless the court intervenes to preserve it. Whether the form of relief is by injunction, by mandamus, or for a declaratory judgment does not alter the question of whether a private protectible interest is in controversy. The difference between the remedy of injunction, mandamus, or declaratory judgment is the extent of the relief asked or permitted to be granted. The plaintiff does not enlarge the scope of a declaratory judgment action by refraining to ask for an injunction. The inquiry is the same regardless of the extent of the relief sought. The questions are, does he have a private individual right involved in controversy, is there a justiciable issue involving the right presented to the court, and is or will that right be threatened or violated? The rights of appellee in this case are held in common with the general public. His interests as a property owner and taxpayer are not jeopardized or affected as in a taxpayer's suit where wrongful expenditures or the illegal levy of taxes is attempted. The installation of the curb teller machine as authorized by the resolution will affect no special private interest of appellee. His interest as a user of the streets is no different than that of every other citizen, inhabitant, and visitor in the city of Lincoln. He has no special, peculiar, private, protectible interest threatened to be violated nor which can be found or declared by a court to exist such as is required for jus-

tification of a declaratory judgment action. It is significant that the trial court did not attempt to make a declaration of any right or rights of plaintiff. The absence of the existence thereof is the logical explanation of the silence of the court in this respect.

The disposition of this case required by the considerations stated and discussed does not mean that there is no remedy, if the machine is installed and maintained on the sidewalk and the installation of it is illegal. The charter of the city and the criminal code of the state provide methods of relief. Home Rule Charter of Lincoln, Art. II, § 2, subpar. 6, p. 3; §§ 39-118, 41-301, and 41-304, Lincoln Municipal Code 1936; § 28-1016, R. R. S. 1943. The observation made in Powers v. Flansburg, *supra,* is appropriate: "There is nothing * * * to indicate that the criminal laws of the state are in any respect insufficient to punish the defendant and put a stop to the crimes which it is alleged he has committed, if indeed the defendant is guilty as alleged. * * * If the proper officers refuse or neglect to enforce the law, a remedy is provided other than by injunction. If a public nuisance is maintained that affects alike all the members of the community, the public authorities may deal with it, but these plaintiffs have not shown such an interest as will enable them to maintain this action."

The judgment of the district court should be and it is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

IN RE ESTATE OF ELIZABETH EGAN, DECEASED. LEO EGAN, SPECIAL ADMINISTRATOR OF THE ESTATE OF ELIZABETH EGAN, DECEASED, APPELLANT, V. KATHRYN BUNNER, ADMINISTRATRIX OF THE ESTATE OF ELIZABETH EGAN, DECEASED, APPELLEE.

52 N. W. 2d 820

Filed April 11, 1952. No. 33132.

**Appeal and Error.** The overruling of a motion to dismiss an appeal from the county court to the district court in a probate proceeding wherein upon the face of the record it appears that the district court upon appeal has jurisdiction of the subject matter for hearing upon the merits is not a final order within the purview of section 25-1902, R. R. S. 1943, from which an appeal can be taken to this court.

APPEAL from the district court for Grant County: WILLIAM F. SPIKES, JUDGE. *Appeal dismissed.*

*Herman & Van Steenberg,* for appellant.

*William C. Heelan* and *Charles A. Fisher,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

This is an appeal from an order of the district court overruling a motion filed therein by Leo Egan as special administrator to dismiss an appeal taken from the county court by the administratrix. The basis for the motion was that the order of the county court was not a final order from which an appeal could be taken to the district court, and that the district court was without jurisdiction or authority to hear and determine the issues presented by the transcript upon the merits. We dismiss the appeal.

Since the special administrator occupied the position of plaintiff and the administratrix that of defendant, they will be hereinafter designated as such. See In re Estate of Kothe, 131 Neb. 780, 270 N. W. 117.

The record discloses that plaintiff filed a petition in

the county court on September 21, 1950, in the estate of Elizabeth Egan, deceased, praying for his appointment as special administrator of the estate pending a hearing upon and disposition of an application for administration of the estate and the appointment of an administratrix therein, based upon the allegations that there were then on hand and in his possession cattle belonging to the estate which the proposed administratrix was unable to care for and which, being in good marketable condition, should be sold at the then good prices at an advantage for the estate. He also prayed for an order permitting him to sell so many of said cattle as in his judgment would be for the best interests of the estate, and for general equitable relief.

On September 22, 1950, after a hearing, plaintiff was appointed special administrator as prayed. He was required to give bond of $5,000, conditioned as required by law, and was permitted to buy necessary feed for such stock and sell as many of them belonging to the estate as in his judgment would be for the best interests of the estate.

The record does not disclose that he thereafter filed any inventory within two weeks after his appointment, as required by section 30-401, R. S. Supp., 1951. However, on January 5, 1951, plaintiff did file a final account of his administration as special administrator. Therein he reported that he had received $4,883.66 as net proceeds from the itemized sale of 14 cows and 12 steer calves, in which amount the estate had only an undivided one-fourth interest, or $1,220.92, and that the remaining three-fourths interest was the individual property of "your special administrator" under the provisions of a pre-existing verbal operating agreement with his mother, Elizabeth Egan, deceased. He also separately listed 67 other cattle still in his hands, in which he likewise alleged that the estate owned but a one-fourth interest, and that he owned the remaining three-fourths interest therein. All of such cattle he admitted,

however, were branded "OHO" which brand was registered in the name of Elizabeth Egan. The prayer of his account was that the "account be allowed as and for his final account as such special administrator of the estate of Elizabeth Egan, Deceased, and that upon payment and delivery of the assets in his possession to the party entitled thereto he be discharged as such special administrator and the surety on his Official Bond be released from further liability herein."

Thereafter defendant, the duly appointed, qualified, and acting administratrix of the estate, filed numerous appropriate objections to the allowance of such account. To enumerate them here would serve no purpose. It is sufficient to say that the effect of such objections was to substantially allege that plaintiff had failed and neglected therein to timely, fully, fairly, and correctly account as special administrator for all the property and money in his possession or knowledge belonging to the estate, as required by law. Such objections then prayed that a date be set for hearing upon the account and objections thereto, and that upon such hearing plaintiff should be required to make a full, complete, and correct accounting of his acts as special administrator.

On May 16, 1951, a hearing was held in the county court upon the purported account and the objections thereto. Thereafter, on June 7, 1951, the county court rendered a decree in writing, the effect of which was to sustain an oral motion of plaintiff and strike the objections of defendant as premature, and to order, adjudge, and decree that plaintiff's account should be allowed and that he should be discharged from his trust as special administrator upon delivery of the property set forth therein to defendant. Naturally, however, plaintiff's bond was ordered to be and remain in full force and effect until further order of the court.

Therefrom defendant duly perfected an appeal to the district court where a transcript from the county court was timely filed. Thereafter, on July 11, 1951, plain-

tiff filed his petition on appeal in the district court, designating himself therein as "the duly appointed, qualified and acting special administrator" and verifying the same "in his official capacity as special administrator." Plaintiff incorporated in and made a part of such petition his account as special administrator, reaffirmed the same, and alleged that it was true and correct in every respect. He also attached thereto and made a part thereof defendant's objections to his account, alleging that they were improper and untimely, and also recited therein the county court judgment rendered on June 7, 1951, alleging that it was correct. His prayer was for an order overruling defendant's objections, dismissing her appeal, allowing and approving plaintiff's account, or sustaining the decree of the county court, and if such decree should be found correct but indefinite or incomplete, the district court should remand the cause back to the county court for further proceedings.

On the same date plaintiff also filed a motion to dismiss defendant's appeal for the reasons, insofar as important here, that the decree of the county court rendered on June 7, 1951, was not a final order from which an appeal could be taken, and that the district court had no jurisdiction to hear and determine the issues presented upon the merits. On July 26, 1951, defendant filed her answer to plaintiff's petition in the district court, appropriately traversing and presenting the issues to be decided. It prayed that plaintiff should be required to furnish a full, complete, and adequate inventory and accounting of all property, rents, and profits belonging to the estate and turn the same over to defendant, and for general equitable relief.

On September 11, 1951, plaintiff's motion to dismiss defendant's appeal was argued, submitted, and overruled, whereupon plaintiff asked and was granted 10 days within which to file a reply to defendant's answer. Instead of complying therewith, however, plaintiff ap-

pealed to this court from the order of the district court overruling his motion to dismiss defendant's appeal. No order appears in the transcript setting the case for trial on the merits in the district court. Plaintiff simply assumed that the cause would be so tried in that court.

The primary question presented here, as we view it, is whether or not plaintiff's appeal to this court should be dismissed. The answer depends upon the factual situation heretofore recited, and controlling propositions of law hereinafter discussed.

The functions of a special administrator appointed by the county court are to possess, control, and preserve all the estate of decedent until the granting of letters testamentary or of administration. Kelkenney v. Getsey, 137 Neb. 416, 289 N. W. 795. Within two weeks after his appointment a special administrator is required to make an inventory under oath, showing all of the property of deceased which shall have come into his possession or knowledge. § 30-401, R. S. Supp., 1951. A condition of his qualifying bond given to the judge of probate requires that he so return a true inventory thereof and whenever required by the court that he shall deliver all such property to the regular executor or administrator subsequently appointed or to such other person as shall be legally authorized to receive the same. § 30-320, R. R. S. 1943. Upon the granting of letters testamentary or of administration, the power of the special administrator ceases. § 30-321, R. R. S. 1943. However, neither his obligations as such special administrator nor the obligations of his bond are discharged until he reports, accounts for, and delivers all such property to the regular executor or administrator as ordered by the court. The special administrator is an officer of the court, under its direct supervision and control, and any property of the estate in his possession is deemed to be in the hands of the court. Dame, Probate and Administration (3d ed.), § 186, p. 195, § 187, p. 197.

It has long been established in this jurisdiction that county courts have exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons, and that the only jurisdiction thereof which the district court can acquire is by appellate procedure. However, an appeal from the county court when perfected confers upon the district court in the matter appealed the same power possessed by the county court. After the district court becomes so possessed of the case, the county court has no further jurisdiction over the issues so removed. If there should be another trial of the case it must be in the district court which shall proceed to hear, try, and determine the same as provided by sections 30-1606, R. S. Supp., 1951, and 30-1607, R. R. S. 1943, and as provided therein the result, not the case itself, shall be certified back to the county court.

The test of jurisdiction is whether a tribunal had the power to enter upon the inquiry, and not whether its methods were regular, its findings right, or its conclusions in accord with the law. In that connection county courts are without general equity jurisdiction, but in exercising their exclusive original jurisdiction over estates may apply equitable principles to matters within probate jurisdiction and render to the parties interested in the assets of the estate such relief as their respective situations may justify. They have the power to require executors and administrators to exhibit and settle their accounts and to account for all assets of the estate that have come into their possession and to hold them liable for the actual value of any property which they have unlawfully appropriated to their own use. In carrying out their exclusive original jurisdiction in matters relating to the administration of estates of deceased persons, county courts have jurisdiction to determine title to personal property claimed by representatives of decedents' estates. Such is the situation here. This court has gone so far as to conclude that if a third

party who has himself planned or participated in the wasting of an estate and is before the court, as upon the objections to the final account, the court may compel him to refund to the representative what he has unlawfully received. The aforesaid rules have application in the case at bar, controlling decision. Their establishment, together with the reasoning and basis for such rules, will be found in In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675; In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829; In re Estate of Marsh, 145 Neb. 559, 17 N. W. 2d 471; and the recent case of In re Estate of Wiley, 150 Neb. 898, 36 N. W. 2d 483.

As a matter of course, when a special administrator ceases to act as such, he must account for and deliver all the property of the estate in his possession or knowledge to the executor or administrator who acts for all interested in distribution of the estate, and who may examine such accounts and if not satisfactory contest their correctness. 21 Am. Jur., Executors and Administrators, § 823, p. 836. In other words, in such a proceeding none of the controlling rules heretofore set forth are in any manner abrogated or affected by sections 30-407, 30-408, and 30-409, R. R. S. 1943, as argued by plaintiff. In re Estate of Bloedorn, 135 Neb. 261, 280 N. W. 908.

We therefore conclude that when plaintiff filed his account as special administrator and prayed for its allowance, to which defendant appropriately filed objections, the county court had exclusive original jurisdiction to hear and determine the issues presented thereby. Nevertheless, the county court after a hearing not only erroneously entered an order striking defendant's objections but also rendered a final judgment approving plaintiff's account and ordering him discharged as special administrator upon delivery of the property as set forth therein to the regularly appointed administratrix, which determined and disposed of the proceedings upon the merits and as such was a final order appealable to

the district court. In re Estate of Hansen, 117 Neb. 551, 221 N. W. 694, is clearly distinguishable from the situation here presented.

Defendant perfected her appeal therefrom to the district court, which conferred upon the district court in such proceeding the same power as that originally possessed by the county court. In such a situation the district court should proceed to hear, try, and determine the issues presented by plaintiff's petition and defendant's answer in the same manner as if it were an original action therein, and certify the result, not the case itself, back to the county court. Therefore, the trial court properly overruled plaintiff's motion to dismiss. The reasoning and basis for the foregoing conclusions will be found in In re Estate of Marsh, *supra;* Jacobs v. Morrow, 21 Neb. 233, 31 N. W. 739; Ribble v Furmin, 69 Neb. 38, 94 N. W. 967; Ribble v. Furmin, 71 Neb. 108, 98 N. W. 420; Prante v. Lompe, 77 Neb. 377, 109 N. W. 496.

As a matter of fact, in such a situation plaintiff by his own petition on appeal and otherwise fully invoked the jurisdiction of the district court and thus made operative the rule that: "A party invoking the court's jurisdiction in a case where the court has jurisdiction of the subject matter is estopped to object thereto afterward." Webber v. City of Scottsbluff, *ante* p. 48, 50 N. W. 2d 533.

It will also be noted that plaintiff was the party who procured the decree in the county court striking defendant's objections, allowing plaintiff's account, and ordering him discharged as special administrator, which makes operative the rule that: "A party cannot predicate error upon a ruling which he procured to be made." Norwegian Plow Co. v. Bollman, 47 Neb. 186, 66 N. W. 292, 31 L. R. A. 747. See, also, Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367.

After plaintiff's appeal to this court from the overruling of his motion to dismiss defendant's appeal from

the county court, defendant filed a motion in this court to dismiss plaintiff's appeal upon the ground that the order sought to be reversed was not a final order within the purview of section 25-1902, R. R. S. 1943. After oral argument upon the motion we overruled the same.

In that connection defendant's motion in this court to dismiss plaintiff's appeal was renewed and more carefully briefed in argument upon the merits. Upon reconsideration and examination of the record in the light of controlling authorities we are now convinced that the motion should have been sustained and the appeal dismissed.

Doubtless the issues presented by plaintiff's account and defendant's objections thereto was a "special proceeding." However, as heretofore observed, the order of the district court overruling plaintiff's motion to dismiss defendant's appeal from the county court did not affect any substantial right of the plaintiff because, as shown by the record, the district court did have jurisdiction to try the issues upon the merits.

A substantial right has been defined as an essential legal right and not a mere technical one. Clarke v. Nebraska Nat. Bank, 49 Neb. 800, 69 N. W. 104; Western Smelting & Refining Co. v. First Nat. Bank, 150 Neb. 477, 35 N. W. 2d 116.

Viewed in such light the order of the district court overruling plaintiff's motion to dismiss defendant's appeal thereto was correct and did not in any manner determine or affect any essential legal right of plaintiff. Rather, the order preserved the jurisdiction and authority of the district court, lawfully conferred and duly invoked by plaintiff himself, to protect all his rights by giving him a hearing upon the merits. Thus it was interlocutory only.

In speaking of two classes of cases involving situations comparable with those heretofore discussed, it was said in Ribble v. Furmin, 69 Neb. 38, 94 N. W. 967: "In the one class of cases, nothing further remains for

the court to do in the proceeding in hand. In the other, notwithstanding the order, before such order can have any substantial effect on the rights of the parties, there must be further action in the same court and in the same proceeding." The case at bar comes squarely within the latter classification.

As stated in 4 C. J. S., Appeal and Error, § 152, p. 323, citing cases: "A judgment or order of an intermediate court refusing to dismiss an appeal, not being a final judgment or order, is not appealable or subject to writ of error, unless it comes within some special statutory provision." Also, as stated at p. 327: "An appeal or writ of error will not lie from or to judgments or orders of an intermediate appellate court in a special proceeding unless it is specially authorized by statute, or unless the statute providing generally for appeals is broad enough to cover them; and, when the statute, as is sometimes the case, expressly authorizes such appeals, a judgment or order, to be appealable, must come clearly within its terms. The proceeding must be a 'special proceeding,' * * * and the proceeding also must affect some substantial right." See, also, 3 C. J., Appeal and Error, § 425, p. 588, § 432, p. 593. As stated in 2 Am. Jur., Appeal and Error, § 80, p. 897: "An order denying a motion for a dismissal of the action is, as a general rule, not reviewable, since such an order lacks finality." To allow an appeal from the overruling of a motion to dismiss in cases comparable with that at bar wherein upon the face of the record it appears that the district court upon appeal had jurisdiction of the subject matter for hearing upon the merits would cause great and unconscionable delays and perpetuate a grave injustice. In such a situation the applicable rules stated in Grimes v. Chamberlain, 27 Neb. 605, 43 N. W. 395, and School District v. Cooper, 29 Neb. 433, 45 N. W. 618, are controlling.

For reasons heretofore stated, we conclude that under the circumstances here presented the order of the dis-

trict court overruling plaintiff's motion to dismiss defendant's appeal thereto from the county court was not a final order within the purview of section 25-1902, R. R. S. 1943, from which an appeal could be taken to this court. Therefore, plaintiff's appeal therefrom to this court should be and hereby is dismissed at plaintiff's costs, and the cause is remanded for further proceedings upon the merits, in conformity with this opinion.

APPEAL DISMISSED.

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DUZZENA FRANZEN, APPELLEE, V. ROY BLAKLEY, DOING BUSINESS AS CITY CAFE, ET AL., APPELLEES, STATE OF NEBRASKA, APPELLANT.
52 N. W. 2d 833

Filed April 11, 1952. No. 33147.

1. **Appeal and Error.** Upon appeal the same cause must be presented in this court that was tried in the court below. If an issue is there tried by both parties, and without objection from either that the issue is not sufficiently pleaded, such objection will not be considered in this court as ground for reversal.
2. **Statutes.** Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning.
3. ———. In the absence of anything to indicate the contrary, words must be given their ordinary meaning.
4. ———. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
5. ———. It is not within the province of a court to read plain, direct, and unambiguous language out of a statute.
6. ———. If possible, the entire statute is to be applied as written.
7. **Workmen's Compensation.** To permit an award of compensation under the provisions of section 48-128, R. S. Supp., 1951, a claimant must in fact have a permanent total disability.
8. ———. The Nebraska Workmen's Compensation Act is to be construed liberally so that its beneficent purposes may not be thwarted by technical refinement of interpretation.
9. ———. For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means

disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

10. ———. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.

11. ———. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted.

12. Statutes. If the words used in a legislative act had, at the time used, received a settled construction, we presume that the Legislature adopted them in that sense.

13. ———. It is to be presumed that the Legislature in using language in a statute will give it the same significance that has already been accorded it by the Constitution and laws of the state, unless a different meaning is provided in the enactment itself or must be drawn from its context.

14. Attorney and Client: Workmen's Compensation. The right to tax attorney's fees in compensation cases is purely statutory. No other authority to allow an attorney's fee is authorized.

15. Workmen's Compensation. Section 48-125, R. S. 1943, relates to an "employer" appealing and failing to reduce the amount of the award and to the taxing of an attorney's fee as costs against the "employer."

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

*Clarence S. Beck*, Attorney General, *Walter E. Nolte*, and *Clarence A. H. Meyer*, for appellant.

*Davis, Stubbs & Healey*, *Richard D. Wilson*, and *Cline, Williams, Wright & Johnson*, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action to recover benefits under the pro-

vision of section 48-128, R. S. Supp., 1951, the second-injury provision of the Workmen's Compensation Act. The matter was heard before one judge of the compensation court, before the compensation court sitting en banc, and on appeal before the district court. Plaintiff prevailed. The State appeals. We affirm the judgment of the district court. Plaintiff cross-appeals asking for attorney's fees. We deny the cross-appeal.

The action was originally brought against plaintiff's employer (a cafe operator), his insurance carrier, and the State of Nebraska. Following the entry of judgment in the district court, plaintiff filed a satisfaction of the judgment insofar as it related to her employer and the insurance carrier. The issue here is between the plaintiff and the State, hereafter called the defendant. The ultimate question presented is the right of plaintiff to recover from the Second Injury Fund.

Both parties agree that the cause is here for trial de novo.

Plaintiff is a married woman. She was born in November 1893. She had a grade-school education. She became engaged in part-time gainful employment in 1935, generally doing cooking, waiting tables, and kindred work.

On December 25, 1941, in an automobile accident, she fractured her right wrist. This was not a compensable injury. Plaintiff's expert witness testified that this resulted in a permanent partial disability of her right hand of 35 to 40 percent. An expert witness called by the employer fixed the permanent partial disability of her right hand and wrist at 25 percent.

Plaintiff began to work for the defendant employer in 1946 or 1947, cooking, washing dishes, waiting tables, and whatever there was to do.

On September 21, 1949, while so employed, she fell and broke her left wrist. This was a compensable injury. Plaintiff's expert witness testified that this resulted in a permanent partial disability of 50 to 65 per-

cent. Defendant employer's expert witness fixed the percentage of permanent partial disability at 35 or 40 percent.

The plaintiff's evidence all goes to the effect that following the 1941 accident she was able to care for herself and to do her housework and the work of her employment by relying largely on her good left hand. Following the second accident she was not able to do the work of her former employment, or any other kind of work that required the effective use of her hands. She was able to do limited housework at home. She required assistance in dressing, cooking, and in much of her housework. Defendant employer's expert witness corroborated this evidence to a material extent. Plaintiff's expert, a practitioner in industrial medicine, testified in effect that because of the condition of her hands she was unemployable. We find no substantial evidence to the contrary.

Considering this evidence, the district court found that plaintiff's 1941 injury resulted in a permanent partial disability of 30 percent of her right hand, and that plaintiff's 1949 injury resulted in a permanent partial disability of 50 percent of her left hand.

The above were findings of fact made by the compensation court which the district court held were supported by the record. We agree with those findings and adopt them as our own. Disagreeing with the compensation court which found only a permanent partial disability, the district court found that plaintiff was totally disabled from earning wages in the same kind of work or work of a similar nature that she had been accustomed to perform or any other kind of work which a person of her mentality and attainments could do, and that plaintiff either in her own particular line of work, or in any other for which she would be fitted, was totally disabled. The district court further found that plaintiff was entitled to recover from the Second Injury Fund "on account of the permanent and total disability"

caused by the 1949 injury combined with the disability caused by the 1941 injury. The district court entered a judgment in accord with the findings.

The defendant contends that there was no issue of total permanent disability before the workmen's compensation court and that the district court acted in excess of its powers under section 48-184, R. S. Supp., 1951.

Plaintiff pleaded in the compensation court that she had a permanent partial disability both as to the 1941 and the 1949 injuries; that she had a permanent disability affecting both hands; and that by reason of the combination of injuries she was entitled to compensation from the Second Injury Fund. The defendant denied that the plaintiff was entitled to any recovery from the Second Injury Fund.

The evidence taken before the compensation court was offered and received as the evidence in the district court. There the defendant was shown to have cross-examined several witnesses, substantially all the questions going to the issue of whether or not plaintiff was totally disabled. It appears to have been accepted that plaintiff's disabilities were permanent.

In its petition on appeal in the district court, the defendant gave as a reason for refusing to accept the award that it allowed plaintiff recovery from the Second Injury Fund for a condition other than permanent and total disability. Plaintiff in her cross-petition on appeal alleged that the compensation court erred in not finding that she was permanently totally disabled. In its motion for a new trial defendant made no direct reference to this question. It is apparent throughout that the matter proceeded at all times on the issue of plaintiff's permanent and total disability.

We do not determine whether or not the issue was sufficiently pleaded. The applicable rule is: "Upon appeal the same cause must be presented in this court that was tried in the court below. If an issue is there tried by both parties, and without objection from either

that the issue is not sufficiently pleaded, such objection will not be considered in this court as ground for reversal." In re Application of Bruno, 153 Neb. 445, 45 N. W. 2d 178.

Section 48-128, R. S. Supp., 1951, provides in part: "If an employee receives an injury which of itself would cause only partial disability but which, combined with a previous disability other than one caused by disease, does in fact cause permanent total disability, the employer shall be liable only for the partial disability which would have resulted from the second injury in the absence of any preexisting disability, and for the additional disability the employee shall be compensated out of a special fund created for that purpose, which sum so set aside shall be known as the 'Second Injury Fund.' "

The defendant contends that there must be a finding, sustained by sufficient evidence, of "permanent total disability" before the employee can be compensated out of the Second Injury Fund. With that contention we agree.

The above provision was enacted in 1947 as an amendment to section 48-128, R. S. 1943. Laws 1947, c. 174, § 1, p. 559. Section 48-128, R. S. 1943, provided: "If an employee receives an injury, which, of itself, would cause only partial disability, but which, combined with a previous disability, does in fact cause total disability, the employer shall be liable only as for the partial disability, so far as the subsequent injury is concerned." It will be noted in the amended act that the Legislature inserted the qualifying "other than one caused by disease" as to "a previous disability," and the qualifying "permanent" as to total disability.

The title of the 1947 act in part is that it is one "to provide for the payment of compensation on account of permanent total disability resulting from second injuries * * *."

The rule is: "* * * '"* * * where the words of a

statute are plain, direct and unambiguous, no interpretation is needed to ascertain their meaning * * *.'" In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read plain, direct, and unambiguous language out of a statute. If possible, the entire statute is to be applied as written." Mook v. City of Lincoln, 146 Neb. 779, 21 N. W. 2d 743.

The meaning of the statute is clear. We hold that to permit an award of compensation under the provisions of section 48-128, R. S. Supp., 1951, a claimant must in fact have a permanent total disability.

This brings us to the defendant's contention that the evidence, and the findings based thereon, do not sustain a finding of permanent total disability. Defendant argues that the disabilities here involved are scheduled disabilities under subsection (3) of section 48-121, R. S. Supp., 1951; that under that section there must be a permanent total loss of the use of both hands in order to constitute total permanent disability; and that as to subsection (3) disabilities it is immaterial whether an industrial disability is present or not present. Defendant relies upon Bronson v. City of Fremont, 143 Neb. 281, 9 N. W. 2d 218, and Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N. W. 2d 11.

Defendant argues that 30 percent and 50 percent permanent partial disabilities do not add up to permanent total disability. As a matter of arithmetic, we agree. But the answer is not that easy.

The applicable rule of construction is that the Workmen's Compensation Act is to be construed liberally so that its beneficent purposes may not be thwarted by technical refinement of interpretation. Ludwickson v. Central States Electric Co., 135 Neb. 371, 281 N. W. 603; Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N.

W. 2d 212; Peek v. Ayres Auto Supply, 153 Neb. 239, 44 N. W. 2d 321.

Defendant in its premise overlooks two essential matters. First, plaintiff's disability to her right hand is not, as such, a compensable injury under section 48-121, R. S. Supp., 1951. It is a fact condition which becomes material in applying the provisions of section 48-128, R. S. Supp., 1951. Second, the Legislature in section 48-128, R. S. Supp., 1951, was not undertaking to provide compensation for a previous disability other than one caused by disease, as such, but rather was undertaking to provide compensation for permanent total disability resulting from a combination of the previous fact condition with a compensable injury. Section 48-128, R. S. Supp., 1951, is a new and additional compensation provision and one designed to distribute the burden of compensation between the employer liable for the compensable injury and the Second Injury Fund.

In Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262, filed May 31, 1946, a few months before the 1947 legislative session, we held consistent with our previous opinions that:

"For workmen's compensation purposes, 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

"A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law."

It is noted that the 1947 act was amended by the 1949 Legislature. Laws 1949, c. 161, § 2, p. 411. The Legislature did not change the language of that part of the

act here involved. Within the year before that session began our opinion was filed in Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891. We there followed Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561, and held: "An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted."

It has long been the rule that if the words used in a legislative act had, at the time used, received a settled construction, we must presume that the Legislature adopted them in that sense. Kendall v. Garneau, 55 Neb. 403, 75 N. W. 852; Thurston County Farm Bureau v. Thurston County, 136 Neb. 575, 287 N. W. 180.

"It is to be presumed that the legislature in using language in a statute will give it the same significance that has already been accorded it by the constitution and laws of the state, unless a different meaning is provided in the enactment itself or must be drawn from its context." State ex rel. Winnett v. Omaha & C. B. St. Ry. Co., 96 Neb. 725, 148 N. W. 946.

Consistent with the findings of the trial court, we find that plaintiff has in fact a permanent total disability and is entitled to the benefits of section 48-128, R. S. Supp., 1951.

This brings us to plaintiff's cross-appeal.

In the district court plaintiff prayed for the recovery of an attorney's fee which that court denied. Plaintiff claims an award for attorney's fees in the district court and here. This claim is based upon the provisions of section 48-125, R. S. 1943, which in part provides: "Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before

the compensation court, a reasonable attorney's fee shall be allowed the employee by the court. In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court."

In this case the defendant State appealed and the plaintiff cross-appealed from the award of the compensation court. Plaintiff's employer answered in the district court. The district court sustained the award as to the defendant employer.

It will be noted that section 48-125, R. S. 1943, relates to an "employer" appealing and failing to reduce the amount of the award and to the taxing of an attorney's fee as costs against the "employer." Obviously the defendant State was not plaintiff's "employer."

The right to tax attorney's fees in compensation cases is purely statutory. Faulhaber v. Roberts Dairy Co., 147 Neb. 631, 24 N. W. 2d 571; Sporcic v. Swift & Co., 149 Neb. 489, 31 N. W. 2d 404. As we said in Rexroat v. State, 143 Neb. 333, 9 N. W. 2d 305, no other authority to allow an attorney's fee is authorized.

The cross-appeal is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

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WILLIS F. FULK ET AL., APPELLANTS, V. SCHOOL DISTRICT NO. 8 OF LANCASTER COUNTY ET AL., APPELLEES.
53 N. W. 2d 56

Filed April 18, 1952. No. 33128.

1. **Schools and School Districts.** School boards of Class II are

creatures of statute with power to bind the district only within the limits fixed by the Legislature.

2. ———. A Class II school district is a creature of statute possessing no powers to contract beyond those granted by the Legislature.
3. ———. In case a Class II school district enters into a contract without the power granted by the Legislature such contract may be declared void and invalidated in an appropriate action.
4. ———. Power of a Class II school district may not flow from emergency, but only from a statutory grant.
5. ———. Within the meaning of the statutes governing Class II school districts the purchase of a residence for the superintendent of schools does not come within the powers granted.
6. **Work and Labor: Schools and School Districts.** Where action of a public organization such as a school district is illegal and void not for lack of power but for failure to properly exercise power which exists, the organization is bound to the extent that it has received the benefits of the action.
7. ———: ———. Where action of a public organization such as a school district is ultra vires and there is no power to act in the premises at all no liability may be imposed upon the organization.
8. **Equity.** The defense of laches is not available to defeat an action in equity where there has been no material change in the defendant's position or in the subject matter of the action caused by plaintiff's delay; nor where the plaintiff has been ignorant of his rights, or, though apprehensive of them, there was such an obscurity in the transaction that it was difficult to gain the facts upon which to maintain the action.
9. **Actions.** A taxpayer may institute appropriate action to test the validity of the expenditure of money by a Class II school district and to have adjudicated an appropriate remedy.
10. **Schools and School Districts.** Where a sale of real estate has been made to a Class II school district which was void for the reason that the district was without power to make the purchase the seller is under a legal obligation to restore the consideration received to the district.
11. **Officers: Schools and School Districts.** In a case where there has been an expenditure of the funds of a Class II school district which expenditure was unlawful for want of power, the officers or members of the board who by their act or acts gave efficacy to the expenditure are liable therefor to the district.
12. **Attorney and Client.** Except as provided by law or by a uniform course of procedure, recovery of attorney's fees is not allowable in this jurisdiction.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Reversed and remanded with directions.*

*Joseph S. Wishart* and *Bartlett E. Boyles,* for appellants.

*Beghtol & Rankin, John C. Mason, Kenneth E. Anderson, Nate Holman, C. Russell Mattson,* and *Clark Jeary,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action in equity by Willis F. Fulk and Walter J. Olsen, residents, taxpayers, and electors of School District No. 8 of Lancaster County, Nebraska, plaintiffs and appellants, against School District No. 8 of Lancaster County, Nebraska, Ross Nisley, Conrad Leader, Robert N. Stall, Otto W. Endorf, Vance Ruckle, and John Te Selle, as members of the school board of the district and as individuals, Dale C. Sturdy, and Dorothy V. Sturdy, defendants and appellees, to have declared null, void, and of no effect a deed executed and delivered to the district on or about October 8, 1949; to have the district restored to the condition and situation occupied by it before the transaction was made and consummated; to have liability adjudicated against the members of the board and the defendants Sturdy for such restoration; and to have a trust impressed upon the lands described in the deed for the purpose of insuring restoration in whole or in part and for costs and attorney's fees.

There was a trial to the court at the conclusion of which findings of fact were made and a decree was rendered declaring valid the purchase represented by the deed and dismissing plaintiffs' petition.

Following the filing of a motion for new trial which was overruled the plaintiffs have appealed.

The assignments of error are: (1) That the court erred in finding that the district faced the alternative of purchasing a residence property or of closing its school, and that a local and statewide emergency existed in regard to such property; (2) that the court erred in finding that the residence of the superintendent is a part of the school system and is used for the necessary functions and duties of the superintendent, either as a matter of law or of fact; (3) that the court erred in finding that the acts of the school board and the members thereof in making the purchase and in expending the funds of the district were authorized and valid as a matter of law; and (4) that the decree infers that the purchase of the property is an authorized power of Class II school districts, and that such inference is erroneous as a matter of law.

The background of the action is substantially the following: During the year 1948 and prior to August 27, 1949, the defendant school district, which will be hereinafter referred to as the school district, was a school district which had been organized and was operating pursuant to Chapter 79, article 6, R. S. 1943. As a district under this organization it will be referred to hereinafter as an article 6 district. By legislative action in 1949 practically the entire body of the public school laws of the state was rewritten. By the school laws of 1949 this district became classified under Chapter 79, article 1, and denominated Class II. § 79-102, R. R. S. 1943. This legislation was approved May 21, 1949, and by operation of law became effective August 27, 1949.

As an article 6 district the district had a board consisting of six trustees. These trustees by the provisions of statute became the members of the board of the district under the new classification. § 79-104, R. R. S. 1943.

The corporate status and the existing rights and liabilities of the district were not changed. It was provided: "The adoption of this revision of the school laws shall not affect the corporate status of existing school

districts, nor disturb existing rights and liabilities * * *." § 79-103, R. R. S. 1943.

The school law with regard to this district before change of classification contained the following with regard to acquisition of and payment for a school site and building: "The qualified voters shall also have power at any annual or special meeting to direct the purchasing or leasing of any appropriate site and the building, hiring or purchasing of a schoolhouse, and the amount necessary to be expended the succeeding year, and to vote a tax on the property of the district for the payment of the same." § 79-210, R. S. 1943.

Section 79-203, R. S. 1943, provides in part as follows: "No schoolhouse site shall be changed nor taxes voted for building, purchase or lease of a schoolhouse at any district meeting unless notices shall have been given of such meeting, as above provided, including therein the fact that such subjects will then be considered."

The notices referred to are contained in this section and section 79-202, R. S. 1943. Section 79-202, R. S. 1943, invalidates any action of a special meeting in the absence of notice stating the object of the meeting. By the terms of section 79-203, R. S. 1943, the regular annual meeting is not invalidated by failure of notice. No schoolhouse site may be changed and no taxes may be voted for building, purchase, or lease of a schoolhouse at such meeting in the absence of notice. See State ex rel. Arterburn v. Cruise, 111 Neb. 114, 196 N. W. 116.

In the 1949 revision the following was substituted for all intents and purposes for section 79-210, R. S. 1943: "The qualified voters of a school district of the first or second class shall also have power at any annual or special meeting (1) to direct the purchasing or leasing of any appropriate site and the building, hiring, or purchasing of a schoolhouse or other school buildings, (2) to determine the amount necessary to be expended for such purposes the succeeding year, and (3) to vote a

tax on the property of the district for the payment of the same." § 79-506, R. R. S. 1943.

It will be observed that in this revised section appear the words "or other school buildings" whereas they did not appear in the old section.

The restrictive provisions of sections 79-202 and 79-203, R. S. 1943, with minor changes of no importance here appear in sections 79-502 and 79-503, R. R. S. 1943, which sections are a part of the revision of 1949.

The 1949 revision contains the following: "The school board or board of education shall (1) provide the necessary appendages for the schoolhouse, * * *." § 79-440, R. R. S. 1943.

The officers of the district, as an article 6 district, were a moderator, a director, and a treasurer. § 79-603, R. S. 1943. The officers were elected by the trustees. The officers after the revision are a treasurer, a secretary, and a president. § 79-701, R. R. S. 1943.

Among the duties of the president is to countersign all orders on the treasury for money to be disbursed by the district and all warrants of the secretary on the county treasurer for money raised for district purposes or apportioned to the district by the county superintendent. § 79-452, R. R. S. 1943.

The treasurer is the custodian of the funds of the district. It is his duty to apply for and receive the money apportioned to the district or collected for the district by the county treasurer. It is also his function to pay out the funds of the district on order of the secretary countersigned by the president. § 79-460, R. R. S. 1943. He is also required to give bond for the faithful performance of his duties. § 79-459, R. R. S. 1943.

On June 14, 1948, at the regular annual meeting of the district the following proceeding was had as shown by stipulation of the parties at the trial:

"Motion made by Ray Clark, seconded by Ross Nisley the School Board be authorized to provide a house for superintendent, not to exceed over $2,500.00, superin-

tendent to pay suitable rent. Eight votes for, two against, one not voting. Carried."

There appears to have been a notice of this meeting. Notice however was not given of any purpose to vote a tax for the building, purchase, or lease of a schoolhouse or other school building.

Nothing was done pursuant to this pretended authorization until September 27, 1949. On this date the record of the minutes indicates that there was a special meeting of the board. The portion of the minutes relating to this subject is the following:

"Motion by Ruckles Sec. by Endorff board act on June 14th 1948 Annual Meeting Motion of purchasing house for Superintendent not to cost over $2500.00 Voted by ballot 4 yes and 2 No Motion Carried."

Another special meeting of the board was held September 30, 1949. With reference to the subject under consideration here the following appears in the minutes:

"School board met at school house in special session at 8:00 P. M.

"Meeting was called by the chairman for the purpose of acting on June 14th 1948 Annual Meeting Motion of purchasing house for Superintendent.

"The board Voted to purchase the Dale C. Sturdy property for Superintendent Residence at $2500.00.

"Roll call Nisley yes Ruckles yes, Stall yes Endorff yes Leader yes TeSelle Not Voting. Carried"

Te Selle testified that at a later date he registered a negative vote. Whether or not this negative vote was recorded does not appear.

There is nothing to indicate that these were or were intended to be district meetings. They clearly were only special meetings of the board. Also there is nothing indicating that the action taken was communicated to the voters of the district.

On September 30, 1949, the officers of the district, namely the defendants Nisley, president, Leader, secre-

tary, and Stall, treasurer, caused to be paid to the defendants Sturdy $500.

By written instrument dated October 7, 1949, these three officers of the district on behalf of the district agreed to purchase Lots 1 and 2, Block 3, West Bennet, an addition to the Village of Bennet, Nebraska, which lots are located in the northwest quarter of the northwest quarter of the northeast quarter of Section 10, Township 8, Range 8, in Lancaster County, Nebraska, for $2,500. The instrument recited a previous payment of $500.

On October 8, 1949, the defendants Sturdy conveyed this real estate by warranty deed to the district. Three warrants were issued to them payable out of the funds of the district for the balance of the $2,500, one for $600 and two each for $700.

We think we may assume that the payments were made pursuant to the requirements of sections 79-452 and 79-460, R. R. S. 1943.

There was no grant of authority for any action taken in this respect other than that heretofore quoted herein as having occurred on June 14, 1948, and September 27 and 30, 1949.

This action of the board based upon the background which has been outlined was validated by the findings and decree of the district court.

Here the plaintiffs reassert the invalidity of the action taken on the grounds asserted in the district court.

Basic in the determination is the question of whether or not the district or the board had statutory power to do the thing which was here done. Unless they or one of them had such power the action is void.

In Ladd v. School District, 70 Neb. 438, 97 N. W. 594, it was said: "School boards are creatures of the statute and their powers are limited. They can bind the district only within the limits which the legislature has fixed; beyond that, their acts are void."

In American Surety Co. v. School District, 117 Neb.

6, 219 N. W. 583, it was said: "A school district is a creature of statute possessing no powers whatever beyond those given by the legislature, and is unable to contract, ad libitum, as individuals may do, but only respecting objects, and to the extent, the law permits."

In School District of Omaha v. Adams, 151 Neb. 741, 39 N. W. 2d 550, it was said: "It should be pointed out that a board of education is a creature of statute, and as such possesses no other powers than those expressly granted by the Legislature."

It follows as of course that where a contract is entered into by a school district without power so to do such contract may be declared void and invalidated in an appropriate action. Ladd v. School District, *supra;* Markey v. School District, 58 Neb. 479, 78 N. W. 932; Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649. The last case cited is not a case involving a school district but strictly speaking a municipal corporation, also a creature of statute with defined powers. In that case it was said: "A contract, entered into by a city without power, express or implied, so to do, is void, and its performance may be enjoined."

In the light of these principles and the powers of school districts of this class as defined by statute it becomes readily apparent that the first assignment of error must be sustained. We have not found therein any emergency power embracing this subject reposed by the Legislature in the district and none has been cited. Likewise we have been cited to no authority the effect of which is to say that there is such implied emergency power.

This court has made it clear that the power of a creature of statute does not flow from emergency, but only from statute. Speaking to this subject in State ex rel. Boxberger v. Burns, 132 Neb. 31, 270 N. W. 656, this court said: "The emergency, as serious as it appears to be, does not empower the county commissioners to

do anything except what they are empowered by law to do."

As to the second assignment of error it appears to be a proper statement that the question of whether or not a residence for the school superintendent was from a factual or practical viewpoint a need is not of controlling importance in determining the legality of this transaction. The controlling question is whether or not the legislative grant contains express or implied power to purchase a residence for the use and occupancy of the school superintendent. Unless it does contain such a grant then, as pointed out in the authorities considered in the discussion of the first assignment of error, the power does not exist.

The plaintiffs insist that there is no such grant of power. The defendants on the other hand insist that there is. They contend substantially that before revision the power flowed from the provision of section 79-210, R. S. 1943, permitting the voters to "direct the purchasing or leasing of any appropriate site and the building, hiring or purchasing of a schoolhouse." They contend substantially that after revision the power flowed from the provision of section 79-506, R. R. S. 1943, to "direct the purchasing or leasing of any appropriate site and the building, hiring, or purchasing of a schoolhouse or other school buildings."

It appears to be that in the former instance the contention is that residence for the superintendent is included within the meaning and definition of "schoolhouse." In the latter it appears that the contention is that residence for the superintendent is included in the meaning of the phrase "schoolhouse or other school buildings."

Numerous cases are cited in support of defendants' contention in this respect but only those from the state of Texas do so.

In Adams v. Miles (Tex. Civ. App.), 300 S. W. 211, in a paraphrase of a statute the court said that the

grant of power allowing the use of school funds for buying school sites, buying, building, and repairing, and renting schoolhouses "and for other purposes necessary in the conduct of public schools to be determined by the board of trustees," amounted to a grant of power to construct and operate dormitories for teachers. This holding was affirmed in Adams v. Miles (Tex. App.), 41 S. W. 2d 21. See, also, Landrum v. Centennial Rural High School Dist. (Tex. Civ. App.), 146 S. W. 2d 799.

Young v. Linwood School District No. 17, 193 Ark. 82, 97 S. W. 2d 627, one of the cases cited, holds that "school buildings" included within its meaning a gymnasium with rooms for home economics and other facilities for the training of students in activities contributing to broader life. This holding was sustained in a brief paragraph in Gibson v. State Board of Education, 201 Ark. 1165, 148 S. W. 2d 329.

Under a statute which authorized a school district to construct necessary appendages for a schoolhouse, the Kansas Supreme Court in Hemme v. School District, 30 Kan. 377, 1 P. 104, held that whether or not a well for the purpose of supplying water to a school was a necessary appendage was a question for a jury.

McNair v. School District No. 1, 87 Mont. 423, 288 P. 188, 69 A. L. R. 866, is a case which treats very comprehensively with what should be properly regarded as the over-all attributes of public education. The breadth as in that case presented appears to be inclusive of those things which contribute not only to the mental training of school children but also to physical well being and improvement and such other qualities as may be regarded as improving their fitness to fill better their place in the established order. In this light it was concluded a school gymnasium was within the meaning of law a schoolhouse. There is nothing in the opinion from which it might be inferred that the court intended to include within the term anything except that which

might be regarded as the educational plant or unit itself.

Reiger v. Board of Education, 287 Ill. 590, 122 N. E. 838, is a case where the court approved the purchase of land more than a block from the schoolhouse site for playgrounds and an athletic field. The approval was on the theory that these activities were a part of the educational program.

Alexander v. Phillips, 31 Ariz. 503, 254 P. 1056, 52 A. L. R. 244, is a case which holds that "schoolhouse" includes such buildings and structures as may be used for the dissemination of education and training including physical education. Pursuant to this holding the issuance of bonds for the construction of a stadium was approved.

In the case of Creager v. School District No. 9, 62 Mich. 101, 28 N. W. 794, no question of definition was involved. The only question presented was that of whether or not the director had power to contract for a fence around school property.

In certain jurisdictions the courts have concluded that housing facilities for teachers may not be regarded as schoolhouses or school buildings. Denny v. Mecklenburg County, 211 N. C. 558, 191 S. E. 26, is one of these. The question there involved appears in the opinion in the following language: "Does the special authorization to the counties of the State, * * *, to issue bonds and notes for the special purposes therein named, including the 'erection and purchase of schoolhouses' and their 'necessary equipment,' carry with it special authority to erect and maintain teacherages in connection with rural consolidated schools?" The question was answered as follows: "To hold as a matter of law that a teacherage is a part of the necessary equipment of a rural consolidated school would be to go farther than the General Assembly has gone, and, perhaps, entail some judicial engraftment. * * * A teacherage, which is to be run for profit and solely for the benefit of the

teachers, is not included within its terms."

Hansen v. Lee, 119 Wash. 691, 206 P. 927, is a case of like import. In this case it was said: "It is not necessary to cite authorities to support the statement that school districts and their directors have only such powers as are by statute given them. A careful reading of all of the provisions of statutes affecting this question * * * shows that they do not, either expressly or by reasonable implication, grant any power or authority to school districts * * * or to their board of directors, to erect dwellings for the use of school teachers." This language was quoted with approval in Denny v. Mecklenburg County, *supra.*

In Pennsylvania fourth class school districts are by statute empowered to purchase or build residences for principals, teachers, and janitors. In Freeport School District v. County of Armstrong, 162 Pa. Superior Ct. 237, 57 A. 2d 692, an action relating to the taxability of such property the court held it was not immune from taxation.

In a summary of numerous pertinent and illuminating observations in the opinion the court said in the concluding paragraph: "Although lawfully acquired, this real estate is not used nor to be used for public purposes, nor for the establishing of a public school system in the Commonwealth, nor for administering the same. Its use, on the contrary, is a private one, being at most a convenience to the school district, and at the same time that use is a commercial one, producing revenue. We do not deem it important that actual rent was charged, rather than a scheme of lowering the salary of the principal and giving the property rent-free. Unless specifically exempted by the Legislature, it is subject to taxation."

We think that the conclusions found in the cases sustaining the position of plaintiffs and the reasoning supporting them represent the basic attitude which has been extended uniformly by the courts of this jurisdiction

toward public school districts and their officers where the corporate form is set forth and the power is prescribed and circumscribed in the statute of their creation. Also we think this is the attitude which should be and remain implicit in the administrative and executive control of such organizations.

In this view we conclude that the purported purchase of the dwelling house in question was illegal and void for the reason that the school district was without power either by vote or by action of the board to make such purchase. It is neither a schoolhouse, nor another school building, nor an appendage for a schoolhouse.

Having come to this conclusion it becomes necessary to characterize the illegal and void action in order to ascertain the proper remedial attitude.

Cases in this jurisdiction hold to the view that where the action of the public organization is illegal and void not because of a lack of power but because of a failure to properly exercise existing power the organization is bound to the extent that it has received the benefits of the action. Grand Island Gas Co. v. West, 28 Neb. 852, 45 N. W. 242; Lincoln & Dawson County Irr. Dist. v. McNeal, 60 Neb. 613, 83 N. W. 847; Cathers v. Moores, 78 Neb. 17, 113 N. W. 119, 14 L. R. A. N. S. 298; Scheschy v. Binkley, 124 Neb. 87, 245 N. W. 267; Harms v. School District, 139 Neb. 714, 298 N. W. 549.

In a situation however where the action is ultra vires and no power exists to act in the premises at all no liability may be imposed upon the statutory creature. Ladd v. School District, *supra;* Markey v. School District, *supra;* Interstate Power Co. v. City of Ainsworth, *supra;* 10 McQuillin, Municipal Corporations (3d ed.), § 29.04, p. 165.

The necessary conclusion is that the action which is under inquiry here was taken without any power so to do by the district or its officers. It was ultra vires and therefore no liability therefor could attach to the district, and it was and is in nowise bound by the action.

Under the circumstances action by these voters and taxpayers is proper to restore to the district the funds which were illegally applied in payment of the purchase price.

The defendants urge that laches on the part of plaintiffs defeats their right to maintain action.

The petition herein was filed on January 7, 1950. The details as to the dates involved in the consummation of the purchase have been set forth hereinbefore. The record does not disclose that the plaintiffs and others occupying a like status in the district were informed of the events as they transpired. How long after the completion of the transaction the plaintiffs came into possession of the information in relation thereto does not adequately appear. Whether or not the action was ever publicized in the district likewise does not appear. It does appear that the action taken at the district meeting in June 1948 was known. It appears significant that the record discloses that efforts to carry into effect the expressed purpose of that action were at least temporarily abandoned because of voiced opposition in the district. It also appears significant that when more than a year later the board did put forth the effort to carry into effect the expressed purpose of the June 1948 meeting the matter was not resubmitted to the district at a regular meeting or one called specially for that purpose. Significant also, we think, is the fact, disclosed by the record, that at least some of the board had information from the office of the Department of Public Instruction that the Attorney General had by opinion ruled that school districts such as this had no statutory authority to purchase residences for superintendents.

Under these facts and circumstances, if this were a case where the rule with regard to laches had application, it could not well be said that these plaintiffs were guilty of laches.

Reasonably it may be said that the plaintiffs were

lulled into a false sense of security by a failure of the board to act promptly at least by making provision for a residence for the commencement of the next succeeding school term.

Reasonably it may be also said that the plaintiffs could not be required to assume that the board would attempt to exercise a power, if it had such power as it chose to exercise, except in a lawful manner, which was not done as is apparent from the statutory provisions heretofore quoted in this opinion.

Reasonably it may be inferred that the plaintiffs had no such notice as would have required or justified action on their part in advance of the completion of this pretended purchase.

The rules with reference to laches as a defense are collected and well stated in Geiss v. Trinity Lutheran Church Congregation, 119 Neb. 745, 230 N. W. 658. One of them, a quotation from a note to Felix v. Patrick, 145 U. S. 317, 36 L. Ed. 719, 12 S. Ct. 862, is the following: " 'The objection of laches is not tenable to defeat an equity cause, where there has been no material change in defendant's position, or in the subject-matter of the action, caused by plaintiff's delay; or where the plaintiff has been ignorant of his rights, or, though apprehensive of them, there was such an obscurity in the transaction that it was difficult to gain the facts upon which to maintain the action' * * *."

This statement in all of its elements appears to have application to the situation, and we think the first element has special application. It cannot well be said that there was any material change in the position of the defendants between the date of the completed transaction and the date of the filing of the petition herein.

There is another and more cogent reason why the plaintiffs must be allowed to prevail in this action. As pointed out the pretended purchase was not a mere irregularity. It was ultra vires and void. In any such case a taxpayer may institute appropriate action to test

the validity of the action and to have adjudicated the proper and appropriate remedy. Grand Island Gas Co. v. West, *supra;* Ladd v. School District, *supra;* Cathers v. Moores, *supra;* State ex rel. Arterburn v. Cruise, *supra;* Interstate Power Co. v. City of Ainsworth, *supra.*

The district court therefore erred in refusing to set aside the pretended purchase, and in refusing by its decree to restore the school district as nearly as possible to its situation before the illegal expenditure of its funds.

The pretended purchase being void the district as of course by the deed received nothing from the defendants Sturdy except color of title to the real estate. These defendants therefore are under a legal obligation to restore to the district the $2,500 received. Cathers v. Moores, *supra;* Neacy v. Drew, 176 Wis. 348, 187 N. W. 218; McCloud & Geigle v. City of Columbus, 54 Ohio St. 439, 44 N. E. 95; 10 McQuillin, Municipal Corporations (3d ed.), § 29.04, p. 170.

In Cathers v. Moores, *supra,* a recovery was not allowed but the language of the opinion draws the distinction between the cases where recovery may and may not be had against the other contracting party. The same substantial distinction is drawn in Neacy v. Drew, *supra.*

The following appears in the citation from 10 McQuillin, Municipal Corporations (3d ed.), § 29.04, p. 170: "The municipal corporation cannot in any manner bind itself by any contract which is beyond the scope of its powers, or entirely foreign to the purposes for which it was created, or which is forbidden by law, or which is against public policy, and, as stated, all persons contracting with the corporation are held to know the limitations in these respects. Hence, every contractor for the doing of public work is bound to take notice, not only of the terms of the ordinance under which the contract is made, but also of the provisions of the charter or statute under which the ordinance has been passed.

In brief, he is required to see not only that his contract complies substantially with the ordinance, but he is compelled to go further and ascertain whether the ordinance is authorized by the controlling law. So, persons dealing with quasi-public corporations, as counties, school districts and the like are bound to take notice of the power and authority of the officers and agents of such corporation. And it has been said that those who deal with the agents of a municipality must assume the risk that all necessary steps requisite to a legal contract have been taken. However, it has been held that where the municipality has power to enter into the contract, but does not observe the required formalities, persons dealing with the municipality need not take notice of the defects."

The rule is approved in McCloud & Geigle v. City of Columbus, *supra.* The court in the opinion set forth several observations which sustain the reasonable validity of the rule among which is the following: "An occasional hardship may accrue to one who negligently fails to ascertain the authority vested in public agencies with whom he deals. In such instances, the loss should be ascribed to its true cause, the want of vigilance on the part of the sufferer, and statutes designed to protect the public should not be annulled for his benefit."

The plaintiffs contend that there is also a liability against the members of the school board for authorization of the expenditure of funds. Of the authorities cited only one tends to support this contention. That one is the case of Burns v. Essling, 163 Minn. 57, 203 N. W. 605. In that it was held that a liability existed against the members of the board on account of the payment of a claim which had been audited and allowed by them which had not been authenticated as provided by law. It will be noted in this connection that there was direct participation in the act which gave efficacy to the instrument of payment.

Other authorities relied on are City of Blair v. Lantry,

21 Neb. 247, 31 N. W. 790; Superior Grade School District No. 110 v. Rhodes, 147 Kan. 29, 75 P. 2d 251; City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 47 N. E. 2d 265, 146 A. L. R. 750; Chicago Park Dist. v. Herczel & Co., 373 Ill. 325, 26 N. E. 2d 119; 4 McQuillin, Municipal Corporations (3d ed.), § 12.217, p. 176.

The effect of all of these authorities is to say in instances that the officers participating in the act which was held to be illegal were liable and in other instances that the officer having charge of the funds and his bondsman were liable.

We think that the appropriate rule should be, and it is so declared, that liability in situations such as this one can attach only to such officers and members of school boards as performed or participated in some act which gives efficacy to illegal expenditure.

As we view the record therefore no member of the board as such performed any such act. They did not on September 27 or 30, 1949, or at any other time do anything more than at most generally authorize the purchase of a residence. They did not directly or indirectly authorize the withdrawal of money from the funds of the district for the payment of the purchase price of this real estate.

The three officers, namely, the defendants Ross Nisley, Conrad Leader, and Robert N. Stall, did so perform. They executed a sales agreement and made a down payment. They, doubtless in the manner provided by statute, which required participation by all three, caused to be drawn and delivered four warrants in payment of the purchase price. For these acts they must be held liable.

Having concluded that the defendants Sturdy and the defendants Nisley, Leader, and Stall are liable it becomes necessary to declare the extent and limits of their respective liabilities. As a guide in this respect no precedent has been cited and none has been found. This however is an action in equity and it is the duty of

this court to equitably determine this question.

Therefore in the light of the record it does not appear equitable that the defendants Sturdy should be required to respond beyond or above the $2,500 received or the present value of the real estate, or $2,500 of its value should the present value exceed $2,500. It is apparent that they acted in good faith and if this had been a transaction between private persons their acts could not have been the subject of legal or other criticism.

If this will not restore the district to its status before the illegal expenditure was made, the defendants Nisley, Leader, and Stall should be required to respond.

The total response should be $2,500 with interest at the legal rate from the date of the respective payments and the costs of the litigation.

In their petition in the district court plaintiffs ask for attorney's fees for their attorneys. This question is of necessity not presented by the assignments of error since the plaintiffs did not prevail. We think however that in the light of what shall be the ultimate determination herein and of the fact that the case is triable de novo here that the right to attorney's fees should be considered.

On this question this court said in Higgins v. Case Threshing Machine Co., 95 Neb. 3, 144 N. W. 1037: "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." See, also, State ex rel. Charvat v. Sagl, 119 Neb. 374, 229 N. W. 118; Voss v. Voss, 144 Neb. 819, 14 N. W. 2d 849; Shepard v. Shepard, 145 Neb. 12, 15 N. W. 2d 195; Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623.

We are not aware of a uniform course of procedure

whereby attorney's fees are allowable in cases such as this one or of a statute authorizing their allowance.

In conformity with and in furtherance of the conclusions arrived at herein the decree of the district court is reversed and the cause remanded with directions to render decree declaring that the sale and purchase of the real estate involved was and is void; that by the deed in question the school district obtained only color of title to the real estate and in actuality it remains the property of the defendants Sturdy; that the defendants Sturdy are indebted to the defendant school district in the amount of $2,500; that the defendants Sturdy be allowed 60 days from the date of the issuance of mandate herein to pay the $2,500; that for failure to pay the $2,500 within the allotted 60 days the court shall appoint a referee who shall sell the real estate as under execution; that on such sale if the amount received shall equal or exceed $2,500 the amount of $2,500 shall be paid to the defendant school district; if it shall exceed $2,500 the excess shall be paid to the defendants Sturdy; and if it shall be less, the amount so received shall be paid to the district.

If a sale shall be had due report thereof shall be made to the district court. In the event that the court shall then find that the sale was for less than $2,500 the court shall render judgment in favor of the school district and against the defendants Nisley, Leader, and Stall for the difference between $2,500 and the lesser amount received.

Whether the amount of $2,500 shall come to the district from the defendants Sturdy or by sale of the real estate or in part by sale and in part by judgment against the defendants Nisley, Leader, and Stall, judgment shall be rendered in favor of the school district and against the defendants Nisley, Leader, and Stall for interest at the legal rate on the payments made on the purchase from the respective dates of such payments until the date of payment of the $2,500 or judgment therefor.

All costs including the costs of sale, should sale be required, shall be taxed to the defendants Nisley, Leader, and Stall.

REVERSED AND REMANDED WITH DIRECTIONS.

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JESSE L. FREEMAN ET AL., APPELLANTS, V. THE CITY OF NELIGH, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
53 N. W. 2d 67

Filed April 18, 1952. No. 33139.

1. **Appeal and Error.** An issue not presented in the trial court may not be raised for the first time in the Supreme Court.
2. **Officers.** Offices are created for the benefit of the public and for the good order and peace of society. The authority of officers is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined.
3. **Officers: Municipal Corporations.** The title of or right to hold the offices of city councilmen cannot be collaterally attacked as a ground for enjoining the enforcement of a city ordinance enacted by them.
4. **Constitutional Law.** Section 17-511, R. S. 1943, is not unconstitutional for failure of lawful classification of property owners or violation of due process.
5. **Municipal Corporations.** The method prescribed by section 17-511, R. S. 1943, granting to cities of the second class power to pave or otherwise improve their streets, is mandatory and jurisdictional, but when the governing boards of such municipalities act within the prescribed limitations thereof, they have power and authority to act thereunder.
6. **Continuances: Appeal and Error.** Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions.
7. ———: ———. A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the trial court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed.

APPEAL from the district court for Antelope County: ROBERT D. FLORY, JUDGE. *Affirmed.*

*Brogan & Brogan*, and *Lightner & Johnson*, for appellants.

*Elven A. Butterfield, Thomas L. Grady*, and *Perry & Perry*, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and ANKENY, District Judge.

CHAPPELL, J.

In this action plaintiffs sought to enjoin defendants, City of Neligh, a municipal corporation of the second class, the mayor thereof, and four individuals allegedly purporting to be members of the city council, from entering into contracts for street improvements, issuing bonds, and levying special assessments to pay therefor under an alleged null and void ordinance creating street improvement districts Nos. 4 to 12 inclusive, in the manner provided by section 17-511, R. S. 1943, an alleged unconstitutional statute.

With consent of all counsel, after a pre-trial conference, the case was set for hearing upon the merits September 4, 1951, at 10 a. m. At that time by leave of court, as provided by section 25-1148, R. R. S. 1943, oral evidence was adduced by the parties upon plaintiffs' motion and application for a continuance predicated upon defendants' alleged refusal to produce or permit plaintiffs to timely inspect and compare certain original records of the city with a certified copy of the proceedings involved. A continuance was denied, but the hearing was adjourned from 10:40 a. m. to 1:30 p. m., as requested by plaintiffs' counsel, to permit them to inspect and compare a relevant transcript of the proceedings with the original records, which concededly plaintiffs' counsel had theretofore inspected for a couple of hours. At 1:30 p. m., without further objections by plaintiffs, the trial court proceeded to hear the issues presented upon the merits.

Plaintiffs adduced their evidence and rested, whereupon defendants severally moved to dismiss plaintiffs' action for want of any lawful right and sufficient evidence to entitle them to injunctive relief as prayed. Defendants' motion was argued and submitted to the trial court, whereupon the court entered an order sustaining the motion, finding generally against plaintiffs and in favor of the defendants, and dismissing the action at plaintiffs' costs. Their motion for new trial was subsequently overruled and plaintiffs appealed, assigning some 12 alleged errors, but arguing only those assigning that: (1) The judgment was not sustained by the evidence but was contrary thereto and contrary to law; and (2) the trial court erred in refusing to grant plaintiffs a reasonable continuance. We conclude that the assignments should not be sustained.

In order to clarify the issues presented to the trial court as distinguished from those raised for the first time in this court, we summarize the pleadings. In that connection plaintiffs substantially alleged in their petition that they were residents and taxpayers of defendant city and that said city was a municipal corporation of the second class, of which defendant F. G. Benning was mayor and the other four individual defendants purported to be members of the city council.

Paragraph 3 alleged that on or about March 12, 1951, while so purporting to act as members of the council, such defendants attempted to pass ordinance No. 285 creating the aforesaid paving districts, which ordinance was null and void by reason of sections 17-611 and 18-301, R. S. 1943, in that upon other occasions but not in the proceedings here involved the four members of the council had allegedly been severally interested directly or indirectly in contracts to which defendant city was a party, thereby disqualifying themselves to be or act as members of the city council and pass such ordinance. Concededly, such defendants had been duly elected and qualified, and there was no allegation that any one or

more of them had been theretofore removed from office by appropriate proceedings.

Paragraph 4 alleged that said ordinance was null, void, and of no effect because it was not read upon three different days as required by law, and that the rule requiring it to be so read was not suspended as provided by section 17-614, R. S. 1943.

Paragraph 5 alleged that even if such ordinance was validly enacted, the notices and subsequent proceedings were invalid and of no force because under the provisions of section 18-130, R. S. 1943, said ordinance could not have gone into effect until 30 days after its passage, but nevertheless defendants did not allow said time to elapse but within such period, before such ordinance became effective, they began to publish notice of creation of the districts, which, for want of an effective ordinance then existing, made all subsequent proceedings null and void.

Paragraphs 6, 7, and 8 alleged, insofar as important here, that section 17-511, R. S. 1943, under which defendants purported to act, was unconstitutional because its provisions did not give resident adjacent property owners who were required to help pay for the improvements the same right to object to creation of the districts as that given to resident directly abutting property owners. There was thus allegedly created an unreasonable classification of property owners which deprived resident adjacent owners of their property without due process of law. Other reasons for unconstitutionality were alleged in such paragraphs but they were all specifically abandoned in the brief.

Plaintiffs thereafter alleged that they had no adequate remedy at law and that unless defendants were enjoined from so unlawfully proceeding as they threatened to do, plaintiffs would suffer irreparable damages and be deprived of their property without due process of law. The prayer asked for injunctive relief in conformity with and predicated upon the aforesaid allegations.

Defendants' answer admitted that plaintiffs were residents and taxpayers of the city; and alleged that the defendant Benning was the mayor and the other four individual defendants were the duly elected and acting members of defendant city council. Defendants specifically denied the allegations in paragraph 4 of plaintiffs' petition and alleged that the rules with regard to the reading of such ordinance were duly suspended and said ordinance was unanimously adopted by members of the council; and denied generally all other allegations in plaintiffs' petition. Defendants' prayer was for dismissal of plaintiffs' action. Plaintiffs' reply thereto denying generally perfected the issues.

Plaintiffs argued in their brief that they were entitled to an injunction because objections to creation of some of the districts were timely filed but the city had failed, neglected, or refused to perform its quasi-judicial function requiring it to ascertain and determine whether or not they were timely filed and sufficient to extinguish the right of the council to proceed, but nevertheless it threatened or continued to unlawfully proceed under the statute and ordinance here involved. The duty of a city council in such a situation was discussed in Hiddleson v. City of Grand Island, 115 Neb. 287, 212 N. W. 619, wherein a statute comparable with the pertinent provisions of section 17-511, R. S. 1943, was construed and applied. However, contrary to plaintiffs' contention, no such issues were pleaded in plaintiffs' petition, and the record does not disclose that the case was tried upon any such theory. Thus, such issues were never presented to the trial court by plaintiffs, and we are not required to decide or discuss them further except to apply the rule that: "An issue, not presented in the trial court, may not be raised for the first time in the supreme court." Stroud v. Payne, 124 Neb. 612, 247 N. W. 595. See, also, Harlan County v. Thompson, 125 Neb. 65, 248 N. W. 801; State ex rel. Sorensen v. Commercial State Bank, 126 Neb. 482, 253 N. W. 692.

At the hearing upon the merits, the trial court sustained defendants' motion to strike paragraph 3 of plaintiffs' petition and ultimately excluded as incompetent and immaterial all evidence offered and adduced by plaintiffs with relation to other purported contractual transactions with the city in which the four individual members of the city council were alleged to have directly or indirectly had an interest. Plaintiffs argued that the trial court erred in so doing. We conclude that it did not.

In that connection, section 17-611, R. S. 1943, provides in part: "No officer of any city or village shall be interested, directly or indirectly, in any contract to which the corporation, or any one for its benefit, is a party. Any such interest in any such contract shall avoid the obligation thereof on the part of such corporation. No officer shall receive any pay or perquisites from the city other than his salary."

Thereafter section 18-301, R. S. 1943, provides: "Any officer of any city in this state who shall be interested, directly or indirectly, in any contract to which the city is a party, or who shall enter into any contract to furnish or shall furnish to any contractor or subcontractor with a city of which he is an officer, any material to be used in performing any contract with such city, shall, upon conviction thereof, be fined in any sum not less than one thousand dollars nor more than five thousand dollars."

Be that as it may, no such contracts are in any manner involved in this case by pleadings or otherwise. In ruling as it did, the trial court correctly applied applicable and controlling rules of law.

This court has heretofore concluded that the title of or right to hold an office cannot be adjudicated by injunction. Fort v. Thompson, 49 Neb. 772, 69 N. W. 110; Osborn v. Village of Oakland, 49 Neb. 340, 68 N. W. 506. In such cases an adequate remedy at law is provided by statute. Here the city was concededly a de jure

municipal corporation and entitled to a city council, the members of which were also de jure insofar as this record discloses. There was no claim or contention that they were not duly elected and qualified as such or that they were theretofore removed by judicial proceedings or otherwise. Therefore, if the ordinance involved was duly passed or adopted it will be upheld.

On the other hand, if the ordinance was duly passed or adopted, we may assume for the purpose of argument only that the four members of the city council were de facto officers and arrive at the same result, because: "The acts of a de facto officer are valid and binding, so far as the interests of the public or third persons are involved." Magneau v. City of Fremont, 30 Neb. 843, 47 N. W. 280, 27 Am. S. R. 436, 9 L. R. A. 786. See, also, State v. Gray, 23 Neb. 365, 36 N. W. 577.

As stated in 62 C. J. S., Municipal Corporations, § 493, p. 934: "Offices are created for the benefit of the public, * * *. For the good order and peace of society their authority is to be respected and obeyed, until in some regular mode prescribed by law their title is investigated and determined. The de jure existence of corporate offices and officers may be determined only in a direct proceeding * * * and the title or right of a de facto officer to the office may not be collaterally attacked. * * * The acts of officers de facto with respect to public matters affecting the public interests are to be regarded as valid and binding; as much so as if the same acts had been performed in the same manner by an officer de jure, and the legality of such acts may not be collaterally attacked." See, also, State v. Central States Electric Co., 238 Iowa 801, 28 N. W. 2d 457, a case factually comparable with that at bar.

We turn then to the factual issues presented by paragraph 4 of plaintiffs' petition. In that regard, plaintiffs offered in evidence, without reservation, a certified transcript of the proceedings involving enactment of the ordinance. Such transcript and other evidence

also adduced by plaintiffs discloses without per adventure of a doubt that section 17-614, R. S. 1943, was unanimously complied with in every respect by the city council. Therefore, we conclude that the allegations of paragraph 4 of plaintiffs' petition were not sustained by any competent evidence.

Plaintiffs cited no authority to support the allegations of paragraph 5 of their petition except the pertinent statutes. We conclude that such statutes do not sustain them. In that connection, section 17-511, R. S. 1943, provides: "Whenever the governing body shall deem it necessary to make any of the improvements named in section 17-509, said governing body shall by ordinance create paving, graveling or other improvement district or districts, *and after the passage, approval and publication of such ordinance, shall publish notice of the creation of any such district or districts* for six days in a legal newspaper of the city or village, if a daily newspaper, or *for two consecutive weeks, if the same be a weekly newspaper.* If a majority of the resident owners of the property directly abutting on the street, streets, alley or alleys to be improved, shall file with the city clerk or the village clerk *within twenty days after the first publication of said notice,* written objections to the creation of such district or districts, said improvement shall not be made as provided in said ordinance; but said ordinance shall be repealed. If said objections are not filed against the district in the time and manner aforesaid, the governing body shall forthwith cause such work to be done or such improvement to be made, and shall contract therefor, and shall levy assessments on the lots and parcels of land abutting on or adjacent to such street, streets, alley or alleys especially benefited thereby in such district in proportion to such benefits, to pay the cost of such improvement." (Italics supplied).

Also, section 17-613, R. S. 1943, insofar as important here, provides: "All ordinances of a general nature shall, before they take effect, be published, *within one*

*month after they are passed,* in some newspaper published in such city or village, * * *." (Italics supplied).

The record discloses that ordinance No. 285 was duly introduced and unanimously passed, approved, and ordered published by the council on March 12, 1951. It was thereafter published on March 14, 1951, within one month after it was passed, as required by section 17-613, R. S. 1943. Thereafter, notice of creation of the district was published on March 22 and March 29, 1951, respectively, for two consecutive weeks in a weekly newspaper, after passage, approval, and publication thereof, as required by section 17-511, R. S. 1943.

Section 18-130, R. S. 1943, does provide that: "no ordinance * * * shall go into effect until thirty days after the passage of the same." Assuming, without deciding, that this section has application, we find no provision in the pertinent statutes requiring that publication of notice of the creation of districts shall not be published until after such 30-day period has elapsed. Rather, the language of the statutes involved and relied upon by plaintiffs indicates that the contrary is true. Such a conclusion is logical because the very purpose of such publication is to give notice to and permit resident owners of directly abutting property to timely object and prevent the ordinance from ever becoming effective or to otherwise make the ordinance lawfully valid and effective. In other words, such publications and notices are mandatory and jurisdictional steps without which an ordinance never would become effective. Manners v. City of Wahoo, 153 Neb. 437, 45 N. W. 2d 113. We therefore conclude that the ordinance was not null and void for any reason alleged in paragraph 5 of plaintiffs' petition.

We also find no merit in paragraphs 6, 7, and 8, alleging as aforesaid that section 17-511, R. S. 1943, is unconstitutional for failure of lawful classification and violation of due process.

In Hoopes v. City of Omaha, 99 Neb. 460, 156 N. W.

1047, this court said: "The word 'adjacent,' in the popular sense thus used, obviously means something in addition to, or different from, 'abutting.' * * * In construing the word 'adjacent,' it was said in Dunker v. City of Des Moines, 156 Ia. 292: 'The word "adjacent" is, at least, somewhat indefinite. Ordinarily, it means "to lie near, close, or contiguous." Webster. Even in its strictest sense it means no more than lying near, close, or contiguous, but not actually touching.' This definition is approved in Hennessy v. Douglas County, 99 Wis. 129; Northern P. R. Co. v. Douglas County, 145 Wis. 288." It will be noted, of course, that "directly abutting" means actually "touching." Resident owners of directly abutting property are most directly interested in obtaining the improvement or extinguishing the right to make it, as provided by section 17-511, R. S. 1943. Their property is directly benefited by the improvement and bears the brunt of assessments levied therefor. Resident adjacent property owners are only incidentally interested or benefited, because their property does not abut upon or touch the improvement. Further, their property bears a small part if any of the assessments levied therefor. In other words, as heretofore observed, the property of directly abutting and adjacent owners is differently situated.

As stated in Field v. Barber Asphalt Co., 194 U. S. 618, 24 S. Ct. 784, 48 L. Ed. 1142, involving a somewhat different but comparable situation: "It is well settled, however, that not every discrimination of this character violates constitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the State from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed."

Therein it was also said: "If the legislature saw fit

to give to those most directly interested and whose consent could be most readily obtained, the right to protest, such action did not deprive other persons of rights guaranteed by the Constitution."

It is now elementary in this jurisdiction as well as elsewhere that an opportunity to be heard with right of review upon the question of assessments for benefits is all that is required to satisfy the due process provisions of the constitutions. Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397. See, also, Hoopes v. City of Omaha, *supra,* citing and quoting with approval from Londoner v. City and County of Denver, 210 U. S. 373, 28 S. Ct. 708, 52 L. Ed. 1103.

We come finally to the question of whether or not in the light of issues heretofore discussed the trial court erred in refusing a longer continuance. We conclude that it did not. In that connection, plaintiffs' motion for a continuance was supported by several affidavits filed therewith, but they were not made a part of the bill of exceptions. Therefore, such affidavits cannot be considered because of the rule that: "'Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions.' Nelson & Cook v. Johnson, 44 Neb. 7, 62 N. W. 244." Macumber v. Gillett, 138 Neb. 714, 294 N. W. 854.

As heretofore observed, however, there was some oral evidence adduced by the parties upon that question prior to trial on the merits. We have examined such evidence in the light of the rule that: "A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed." Waldron v. Lapidus, 121 Neb. 54, 236 N. W. 139. See, also, Mahaffy v. Hansen Live Stock & Feeding Co., 105 Neb. 9, 178 N. W. 829; Harrington v. Hedlund, 89 Neb. 272, 131 N. W. 212.

The evidence discloses that the records of the city

which plaintiffs desired more time to inspect were entirely immaterial and had no relation to appropriate issues presented upon the merits. Plaintiffs were given ample time to inspect and compare the competent material and related records. We conclude that the trial court did not abuse its discretion.

Other matters were assigned as error but they were either not argued in the brief or if argued they involved issues not raised in the trial court but raised for the first time in this court. Such questions will not be discussed.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs in the district court and in this court are ordered taxed to plaintiffs.

AFFIRMED.

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AL PERRY, APPELLEE, V. FRANK GROSS ET AL., APPELLANTS.
53 N. W. 2d 73

Filed April 25, 1952. No. 33086.

1. **Evidence.** Parol evidence of a prior or contemporaneous oral agreement is not admissible to vary, alter, or contradict the terms of a written agreement.
2. ———. The parol evidence rule is one of substantive law as well as of evidence and as a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement.
3. ———. As an exception to the parol evidence rule a distinct oral agreement constituting a condition on which performance of a written contract or agreement is to depend is enforceable.
4. **Appeal and Error.** An assignment of error is too indefinite to present a question for review where a motion for new trial assigns numerous grounds therefor and the assignment of error in this court fails to specify to which one or more of the various points made by the motion the assignment was intended to apply.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed.*

*Donovan, Frohm & Dalton,* for appellants.

*Leonard A. Hammes* and *John A. McKenzie,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action at law by Al Perry, plaintiff and appellee, against Frank Gross, Victor L. Gross, and Gross Real Estate Brokers, defendants and appellants, for the recovery of money had and received by defendants from the plaintiff in the amount of $2,000 with interest.

The cause was tried to a jury and a verdict was returned in favor of plaintiff. Judgment was rendered on the verdict.

After judgment the defendants filed an alternative motion for judgment notwithstanding the verdict or for a new trial. The alternative motion was predicated on motions made respectively at the close of plaintiff's evidence and at the close of all the evidence for a directed verdict, which were overruled. The alternative motion was overruled.

From the judgment and the order overruling the alternative motion the defendants have appealed.

In the brief as grounds for reversal there are five assignments of error. One of the five is predicated on the refusal of the court to sustain a motion to strike evidence which had been adduced on behalf of the plaintiff. The other four fairly analyzed and applied challenge the sufficiency of the evidence to sustain a cause of action in favor of the plaintiff and against the defendants.

The substantial contention of the defendants is that the pleaded and proved theory of plaintiff's action furnishes no legal basis for the recovery of judgment against the defendants.

To the extent necessary to state here the plaintiff alleged that on August 10, 1948, he signed a listing agreement with defendants whereby they became agents to sell for him the west half of Lot 11, Block 20, West Benson, an addition in Douglas County, Nebraska, for $16,500 net to plaintiff. At that time the defendants as agents for the owners had for sale a tract of land for $22,500 which they offered to plaintiff. The plaintiff desired and offered to buy the land but informed the defendants that he would be unable to do so unless his property could be sold. Thereupon by oral agreement between him and the defendants he advanced to defendants $2,000 not as part payment on the purchase price of the land but to show good faith in his offer to purchase the land. If the defendants failed to sell his property they were to return the $2,000 to him. The defendants failed to sell plaintiff's property, and in consequence plaintiff demanded repayment of the $2,000 which was refused. The prayer is for judgment in this amount with interest.

The defendants answered the petition at length but in the light of the character and quality of the assignments of error it appears necessary to say only that the allegations of the petition charging liability were denied, and they alleged that the $2,000 was paid to defendants as a down payment to be paid by them to Howard R. Young and Sarah C. Young on the purchase price of land belonging to them which plaintiff agreed to purchase under a written sales agreement entered into between plaintiff and defendants on August 10, 1948. The agreed purchase price of the land which land is the same as was referred to in plaintiff's petition was $22,500.

As is apparent from what has been said with reference to the contents of the petition plaintiff's cause of action is dependent upon the alleged oral agreement as to the disposition of the $2,000 in event of failure of sale of plaintiff's property by the defendants.

That there was sufficient evidence to sustain the finding of the jury that the parties entered into the alleged oral agreement there can be no doubt. The plaintiff and his wife testified to it completely and comprehensively. The serious question in this connection is, assuming that the oral agreement was proved, does it support or sustain a right of recovery in favor of plaintiff? The defendants substantially insist that it does not.

Their theory is that the contract proved is an oral contemporaneous agreement the effect of which if enforced would be to vary, alter, and contradict the terms of a written agreement, a thing not permissible under well-established principles of law.

The principle for which the defendants contend is well established. Parol evidence of a prior or contemporaneous agreement is not admissible to vary, alter, or contradict the terms of a written agreement. Smith v. Bailey, 105 Neb. 754, 181 N. W. 926; Spiegal & Son v. Alpirn, 107 Neb. 233, 185 N. W. 415; Davis v. Ferguson, 111 Neb. 691, 197 N. W. 390; Cox v. Rippe, 146 Neb. 309, 19 N. W. 2d 514; Arman v. Structiform Engineering Co., Inc., 147 Neb. 658, 24 N. W. 2d 723.

Also the parol evidence rule is not merely one of evidence. It is one of substantive law as well. As a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement. The admission of evidence without objection in proof of an oral agreement which is in violation of the parol evidence rule furnishes no basis for enforcement of the oral agreement. Theno v. National Assurance Corp., 133 Neb. 618, 276 N. W. 375; Arman v. Structiform Engineering Co., Inc., *supra*.

There are however what have been regarded in the decisions as exceptions to the parol evidence rule. The plaintiff contends that the instant case falls within this category.

In the decisions of this court and of courts of other

jurisdictions exceptions to the rule have been recognized.

In Norman v. Waite, 30 Neb. 302, 46 N. W. 639, it was said: "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend." This pronouncement was followed in Exchange Bank of Ong v. Clay Center State Bank, 91 Neb. 835, 137 N. W. 845, and Johnson v. Shuler, 134 Neb. 25, 277 N. W. 807. See, also, Davis v. Sterns, 85 Neb. 121, 122 N. W. 672; Seminole Bond & Mtg. Co. v. Investors Realty Co., 127 Neb. 193, 254 N. W. 732; Mire v. Haas (La. App.), 174 So. 374; Smith v. Fergus County, 98 Mont. 377, 39 P. 2d 193; Moore v. Wilson (Tex. Civ. App.), 138 S. W. 2d 1099; Annotation, 25 A. L. R. 822.

The oral agreement appears to fall within the category described in the quotation from Norman v. Waite, *supra*, that is, a distinct oral agreement which constitutes a condition on which performance of the written contract or agreement was to depend.

We conclude therefore that the oral contract alleged was valid and that neither the contract nor proof thereof was violative of the parol evidence rule.

As has been already pointed out the evidence of plaintiff was sufficient as proof of the oral agreement.

It is this evidence which has been held to be sufficient as proof of the oral agreement that forms the basis of the fifth assignment of error.

Plaintiff's evidence in proof of the oral agreement was adduced and admitted without objection. At the close of plaintiff's evidence the defendants moved that it be stricken as being inadmissible under the parol evidence rule.

What has already been said herein with regard to the parol evidence rule fully disposes of this assignment adversely to the defendants.

One of the four assignments of error which have been considered collectively herein complains that the court erred in overruling the motion for a new trial. The motion contains 27 separate alleged grounds of error. Neither the assignment in the brief nor the discussion thereof directs attention to any one or more of the assignments in the motion. In the light of this the assignment does not require consideration by the court.

In discussing a like situation this court said in Walker v. Allen, 58 Neb. 537, 78 N. W. 1070: "The assignment is too indefinite to present a question for review, because the motion for a new trial assigns several distinct grounds therefor, and the assignment of error in this court omits to specify to which one of the various points made by the motion the assignment was intended to apply."

The judgment of the district court is affirmed.

AFFIRMED.

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MABEL R. HORN, APPELLANT, V. HARRY E. GATES ET AL., APPELLEES.
53 N. W. 2d 84

Filed April 25, 1952. No. 33095.

1. **Homesteads.** Whether one has acquired a homestead, or having acquired it has abandoned it, is a question of fact.
2. ———. The burden rests upon one asserting an abandonment of a homestead to establish such abandonment by a preponderance of the evidence.
3. ———. An intention to abandon and an actual abandonment must concur to establish the abandonment of a homestead interest.
4. ———. Ordinarily, where the owner of a homestead removes therefrom with his family and moves to another home, of which he is the owner, it will be presumed that he has abandoned the

first home and thereby the homestead right in it. But this, like other presumptions, may be rebutted by evidence to the contrary.

5. ———. A person cannot at the same time have two homesteads, nor can he have two places either of which, at his election, he may claim as his homestead.
6. ———. Our statute uses the term "homestead" in its commonly accepted meaning—the house and land where the family dwells.
7. **Homesteads: Executors and Administrators.** Immediately upon the death of a husband the homestead vests in his widow and should not be taken into account in the administration of his estate.
8. ———: ———. If, at the time of the husband's decease, there was a homestead the widow cannot abandon that homestead and select another out of the estate in lieu thereof.

APPEAL from the district court for Sarpy County: THOMAS E. DUNBAR, JUDGE. *Reversed and remanded.*

*William R. Patrick,* and *Smith & Smith,* for appellant.

*William Ritchie,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Mabel R. Horn brought this action in the district court for Sarpy County to partition a tract of land located therein, consisting of 330 acres, in which she claims to be the owner of an undivided one-third interest. Loverna E. Gates filed an answer claiming a homestead right in 160 acres of this land, including the house located thereon. Trial was had and the court found Loverna E. Gates had a homestead right therein and set out to her a life estate in the 160 acres thereof which she had selected therefrom, including the house located thereon. It ordered partition of the balance of the tract, finding that Loverna E. Gates, Harry E. Gates, and Mabel R. Horn each owned an undivided one-third interest therein.

Mabel R. Horn filed a motion for new trial and, from the overruling thereof, took this appeal. By her appeal she questions the correctness of the trial court's

decision as it relates to the decreeing of a homestead right in the farm, consisting of a life estate in 160 acres of the land, to Loverna E. Gates. This being an action in equity we will consider the record de novo. In doing so the following principles are applicable:

"Whether one has acquired a homestead, or having acquired it has abandoned it, is a question of fact * * *." Waltz v. Sheetz, 144 Kan. 595, 61 P. 2d 883.

"The burden rests upon one asserting an abandonment of a homestead to establish an abandonment by a preponderance of the evidence. Karls v. Nichols, supra. An intention to abandon and an actual abandonment must concur to establish the abandonment of a homestead interest. National Bank of Commerce v. Chamberlain, 72 Neb. 469, 100 N. W. 943." Phifer v. Miller, 153 Neb. 748, 45 N. W. 2d 907. See, also, Whitford v. Kinzel, 92 Neb. 373, 138 N. W. 597; Blumer v. Albright, 64 Neb. 249, 89 N. W. 809; Union Stock Yards Nat. Bank v. Smout, 62 Neb. 227, 87 N. W. 14; Flynn v. Riley, 60 Neb. 491, 83 N. W. 663.

The record discloses the following facts: Sometime in 1887 Loverna E. Gates, one of the appellees, and Charles E. Gates were married. They immediately moved onto this land in Sarpy County and continued to live on it until sometime in December 1923. During this time their two children were born, a daughter, Mabel R., now Mabel R. Horn the appellant, and a son, Harry E., one of the appellees. In the fall of 1923 Charles E. Gates, then being about 59 years of age, decided to retire. This decision was influenced by the health of his wife. She had had the flu "quite a while before" and had never fully recovered therefrom. To carry out this purpose he bought a five-room residence with basement, located at 3803 South Twenty-third Street in South Omaha, which is legally described as Lot 16, Block 4, Spring Lake Park Addition to the City of Omaha. Charles E. and Loverna E. Gates moved into this property sometime in December 1923. At that time

Mabel was living with her husband, Alva, in Papillion, Nebraska, and Harry E., the son, together with his wife, the appellee Gertrude Gates, were living on this farm but in a house about one-half mile west of the home place. When the parents moved they took with them all the furniture they needed to furnish the new home, which was smaller than the one on the farm, and left the balance. However, they did not reserve a room in the house on the farm in which to keep it nor to return to. It is apparent they left it because they could not use it in the new home. After they moved out the son, together with his family, immediately moved into the home place. They have lived there ever since, renting it from the father during the latter's lifetime. When the parents moved they also left some implements and two horses. These the son used, as long as serviceable, in his farming operations.

The farm was only six miles from the new home in South Omaha. After they moved the father, usually accompanied by the mother, came out to the farm often, especially if the weather was good. While there he took care of the garden and also did some light work in the fields. However, the parents always returned to their own home for the night. In fact, the evidence shows there was only one occasion, during approximately 25 years, that the parents stayed away from their home in South Omaha over night. That occurred when a break in a gas main made it necessary for them to do so.

After they moved to South Omaha Charles E. Gates, on February 2, 1924, registered for voting stating he was a retired farmer whose residence was "3803 South 23rd Street." The parents continued to live in this residence until Charles E. Gates died on August 10, 1948. Thereafter Loverna, the widow, lived for some five or six months with her daughter in Papillion. Since then she has been living with her son on the farm.

Charles E. Gates died intestate and at the time of

his death he was the owner of the 330 acres herein being sought to be partitioned and the residence property located at 3803 South Twenty-third Street. He left as his heirs at law his widow and two children, all of whom have herein been sufficiently identified.

This court has often said that the homestead law should be liberally construed in favor of those for whose benefit it was enacted. See, First Nat. Bank of Tekamah v. McClanahan, 83 Neb. 706, 120 N. W. 185; Hanlon v. Pollard, 17 Neb. 368, 22 N. W. 767; Bowker v. Collins, 4 Neb. 494. But naturally such construction must be within the limits of those principles applicable thereto and not in violation thereof.

The following principles, which have a bearing here, have been announced by this court:

"We do not think that the fact of registration, even if it be conceded that it was procured to be made by the party in person * * * would be conclusive proof of the abandonment of the homestead, but would be a fact to be considered, as any other fact in the case, and to be given such weight as it was entitled to under the rules governing the consideration of testimony." Mallard v. First Nat. Bank of North Platte, 40 Neb. 784, 59 N. W. 511.

"Ordinarily, where the owner of a homestead removes therefrom with his family and to another home, of which he is the owner, it will be presumed that he has abandoned the first home and thereby the homestead right in it. But this, like other presumptions, may be rebutted by evidence to the contrary, * * *." Allen v. Holt County, 81 Neb. 198, 115 N. W. 775.

"A person cannot at the same time have two homesteads, nor can he have two places either of which at his election he may claim as his homestead." Hair v. Davenport, 74 Neb. 117, 103 N. W. 1042. See, also, Berggren v. Bliss, 122 Neb. 801, 241 N. W. 544; Wapello County v. Brady, 118 Iowa 482, 92 N. W. 717; Preston v. Ottawa County Nat. Bank, 138 Okl. 133, 280 P. 581.

"Our statute uses the term 'homestead' in its commonly accepted meaning—the house and land where the family dwells." Meisner v. Hill, 92 Neb. 435, 138 N. W. 583. See, Berggren v. Bliss, *supra;* Bowker v. Collins, *supra.*

"If the legal title to the homestead is in the husband, and there are no claims of his creditors against it, upon his death the homestead vests in the widow for life, without regard to its value, and in the absence of a will of the husband his heirs take the homestead subject to the life estate of the widow." Meisner v. Hill, *supra.*

"Under our statute, when the holder of the legal title of the homestead dies, the law creates new estates, a life estate in his widow and an estate in remainder in his children and heirs. It is immaterial whether the widow and children continue to occupy the premises. Their estates do not depend upon the occupancy thereof after the death of the holder of the legal title, but vest in them absolutely on his death." Naiman v. Bohlmeyer, 97 Neb. 551, 150 N. W. 829.

"Immediately upon the death of the husband, the unincumbered homestead vested in his widow and could not be taken into account in the administration of his estate. In re Hadsell, 82 Neb. 587." Dillon v. Dillon, 103 Neb. 322, 171 N. W. 917. See, also, Bartels v. Seefus, 132 Neb. 841, 273 N. W. 485; Hobson v. Huxtable, on rehearing, 79 Neb. 340, 116 N. W. 278.

If, at the time of the husband's decease, there was a homestead, the widow cannot abandon that homestead and select another out of the estate in lieu thereof. See, In re Estate of Nielsen, 135 Neb. 110, 280 N. W. 246; Thompson on Homesteads and Exemptions, § 542, p. 459; Hendrix v. Hendrix, 46 Tex. 6; Chambers v. McPhaul, 55 Ala. 367; Harris v. Howard, 26 Ky. L. R. 366, 81 S. W. 275; Anderson v. Shannon, 146 Kan. 704, 73 P. 2d 5, 114 A. L. R. 200; Powell v. Powell, 189 Okl. 255, 116 P. 2d 889; McGaugh v. Davis, 150 Ala. 558, 43 So. 745.

While the widow testified she never thought much about a homestead, that in her younger days she thought the farm was her home, that she did not want to go to South Omaha, and that she called the farm the home place, nevertheless, the record shows they did move to the residence property they bought in South Omaha and lived there without interruption for about 25 years, until her husband died. We are satisfied, from all the circumstances shown by the record, that these folks decided to retire from the farm and did so in 1923; that while this decision was influenced by the condition of the wife's health it was not solely because thereof; that when they moved it was their intention to abandon the home on the farm and make a new home in the residence property which they had purchased, which is fully shown by the many years they lived there and their manner of living during those years; and that when Charles E. Gates died the residence in South Omaha was their homestead. Therefore, upon his death, it vested in her as such and she was not free to make a selection of 160 acres from the farm.

Having come to the conclusion that the widow did not have a homestead right in the 330 acres of farm land which appellant sought to partition, the holding of the trial court to that effect is in error and is reversed. We find that appellant, Mabel R. Horn, and appellees, Loverna E. Gates and Harry E. Gates, each have an undivided one-third interest in the 330 acres of farm land as tenants in common, being the sole heirs at law of Charles E. Gates, deceased, and that appellant is entitled to a decree for the partition thereof accordingly.

It is therefore ordered that the decree of the trial court be reversed and the cause remanded with directions that it enter a decree in accordance herewith.

REVERSED AND REMANDED.

EARL KLINGINSMITH, APPELLANT, V. ROSS ALLEN, APPELLEE.
53 N. W. 2d 77

Filed April 25, 1952. No. 33155.

1. **Husband and Wife: Appeal and Error.** Where the issues in an action for criminal conversation are presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong.
2. **Husband and Wife: Evidence.** Statements made by plaintiff's wife to plaintiff out of the presence of defendant are inadmissible in an action for criminal conversation to prove the alleged wrongful conduct of the defendant.
3. ———: ———. Such statements are only admissible in such cases where alienation of affections is pleaded by plaintiff as an issue or element of damages and then only when relevant and offered for the limited purpose of showing the wife's state of mind or feelings toward plaintiff.
4. **Evidence.** The exclusion of evidence of a fact or facts fully established by other competent and uncontradicted evidence is not reversible error.
5. ———. The admission of cumulative evidence is ordinarily within the discretion of the trial court and its ruling thereon will not be held erroneous unless it clearly appears that such discretion has been abused.
6. **Trial.** Where instructions are asked which are not applicable to any controverted issue presented by the pleadings and evidence, they should be refused.

APPEAL from the district court for Valley County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

*Davis & Vogeltanz,* for appellant.

*Harold A. Prince* and *George A. Munn,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff brought this action at law to recover damages for criminal conversation without pleading any issue of alienation of his wife's affections as an element of damages. Concededly they were not alienated. The defense was a general denial.

The issues were submitted to a jury, whereupon it

returned a verdict for defendant and judgment was rendered thereon in his favor. Plaintiff's motion for new trial was overruled and he appealed, assigning substantially that: (1) The verdict and judgment were not sustained by sufficient evidence but were contrary thereto and contrary to law; (2) the court erred in exclusion of certain evidence; and (3) the court erred in refusing to give plaintiff's requested instruction No. 15. We conclude that the assignments should not be sustained.

The first assignment has no merit. It is elementary that in a law action where the issues are presented to a jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong. Cantin v. Howard, 131 Neb. 192, 267 N. W. 423. As stated in such opinion: "It is also quite evident that the conflicting evidence in the record before us invokes the application of the principle that in a suit of this character, where the evidence submitted tended to prove improper conduct and undue familiarity between the wife and defendant, which is met by opposing proof, the questions of the weight of the testimony of the witnesses, and the inferences to be drawn from all the evidence presented, are for the determination of the jury. Wheeler v. Abbott, 89 Neb. 455, 131 N. W. 942."

No complaint is here made that any of the instructions given by the trial court were erroneous. The issues presented and correctly submitted to the jury were simply whether or not defendant had adulterous relations with plaintiff's wife as alleged, and if he did, the amount of plaintiff's damages caused thereby.

To recite the salacious evidence appearing in the record would serve no useful purpose. As disclosed by the record, plaintiff's wife testified that defendant did clandestinely have such relations with her upon several specific occasions, all of which, as a witness in his own behalf, defendant positively and categorically denied. Other respectively supporting evidence, facts, and cir-

cumstances adduced by the parties were also more or less conflicting in character. Thus, a jury question was presented and we conclude that there was ample competent evidence in the record to sustain the verdict and judgment. Contrary to plaintiff's contentions, we find nothing in the record which could sustain a conclusion that the verdict was clearly wrong or the result of mistake, passion, or prejudice.

After certain pertinent questions had been asked plaintiff by his counsel and objection thereto had been sustained, an offer was made by plaintiff to prove that his wife subsequently on September 22, 1951, "told him of the various times of intercourse and we make this offer on the ground that this testimony is admissible in criminal conversation or alienation suits." Objection thereto was sustained and plaintiff in the second assignment argued that such ruling was erroneous. We conclude otherwise.

The only authority cited by plaintiff to sustain such contention was Larsen v. Larsen, 115 Neb. 601, 213 N. W. 971, an action brought by a wife against third persons to recover damages for alienation of her husband's affections. In that opinion it was said: "On the trial of the case the wife was permitted, over objections of the defendants, to detail in evidence conversations which she had had with her husband, in the absence of the defendants, for the purpose of showing, or tending to show, the condition of her husband's mind and his feelings toward her at such respective times. As we said in the course of our opinion in Stocker v. Stocker, 112 Neb. 565: 'While evidence of what the husband said out of the presence of the defendant would ordinarily be hearsay and incompetent to prove such wrongful conduct of defendant as would tend to cause the husband to lose his affection for his wife, such evidence may be properly received to show the state of the husband's feelings toward his wife, and in this case the court, by proper instruction, informed the jury that such evi-

dence was received only for such purpose.' Hence, error was not committed by the trial court in admitting this evidence for such purpose."

Plaintiff cited no authority and we have found none holding that such evidence would be admissible generally to prove the alleged wrongful conduct of defendant. In Cabana v. Olivo, 58 R. I. 252, 192 A. 302, after citing and quoting from numerous authorities, the court said: "In the instant case the alleged statements by the wife had no real bearing on the state of her mind at the time toward either of the parties, but were only relevant to the past conduct of the defendant. Therefore the husband's testimony to them was clearly inadmissible, being merely hearsay of the most objectionable character." Such statement has application here.

The statements in the case at bar would be admissible only in the event that this had been an alienation of affections suit or an action wherein such issue had been pleaded as an element of damages, and then only when relevant and offered for the limited purpose of showing the wife's state of mind. This was not an action involving any such issue or element. Therefore we conclude that the offer was properly refused.

In any event the evidence offered was merely cumulative. As a witness for plaintiff the wife had theretofore affirmatively testified both upon direct and cross-examination with regard to every prior alleged wrongful act of defendant and had also testified that subsequently on the involved specific date she had confessed thereto in statements made to her husband. The testimony that she had confessed was not and of course could not have been denied by defendant. In Barr v. City of Omaha, 42 Neb. 341, 60 N. W. 591, this court held: "The exclusion of evidence of a fact fully established by other competent and uncontradicted evidence is not reversible error." See, also, O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123, wherein this court held that: "The admission of cumulative evidence is ordinarily within the

discretion of the trial court and its ruling thereon will not be held erroneous unless it clearly appears that such discretion has been abused." Such rules have application here.

We turn then to the third assignment. Instruction No. 15 tendered by plaintiff and refused by the trial court read: "You are instructed that the consent of the wife of the plaintiff to the intercourse with the defendant does not defeat the plaintiffs right to recovery." In that connection plaintiff argued, without citing any authority, that such refusal was erroneous. We conclude otherwise.

The record affirmatively discloses that defendant claimed no such defense in mitigation of damages or otherwise. It was not in any manner by pleadings or evidence made an issue in the case. The recognized primary issue was simply whether or not defendant had adulterous relations with plaintiff's wife. Instructions Nos. 2, 4, 6, and 7, given by the court, so informed the jury in clear and unambiguous language. Plaintiff could not have been prejudiced by the court's refusal to give the instruction. In that regard, comparable situations were presented and disposed of in different kinds of cases but in like manner by Lau v. Grimes Dry Goods Co., 38 Neb. 215, 56 N. W. 954, and Hurlbut v. Hall, 39 Neb. 889, 58 N. W. 538, wherein it was held: "It is not error to refuse to give an instruction not applicable to the pleadings and evidence, although correct as an abstract proposition of law." Whether or not the tendered instruction was a complete statement of the law we need not discuss or decide.

In Lewis v. Miller, 119 Neb. 765, 230 N. W. 769, 70 A. L. R. 532, this court said, quoting from Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19: " 'In stating the issues of fact in its charge to the jury, the court should submit to the jury only such issues as are presented by the pleadings and are in controversy, and which find some support in the evidence.' " As early

as Webster & Burr v. O'Shee, 13 Neb. 428, 14 N. W. 164, this court held: "Where instructions are asked which are not applicable to the issue made by the pleadings they should be refused." See, also, Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396; Cornell v. Haight, 87 Neb. 508, 127 N. W. 901.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

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WANDA RACE, APPELLEE, V. FRANK MRSNY, APPELLANT.
53 N. W. 2d 88

Filed April 25, 1952. No. 33157.

**Parent and Child: Children Born out of Wedlock.** The amount, which a defendant in a proceeding had by virtue of the statute relating to children born out of wedlock will be required to pay for the support of his child, is in the discretion of the district court. Its award will not be disturbed unless discretion has been abused and it is manifestly excessive.

APPEAL from the district court for Madison County: LYLE E. JACKSON, JUDGE. *Affirmed as modified.*

*Bernard A. Ptak,* for appellant.

*Hutton & Mueting,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellee, an unmarried woman, gave birth to a child. Appellant was, in proceedings had by virtue of the statute relating to children born out of wedlock, found and adjudged to be the father of the child. Chapter 13, R. S. 1943. The trial court held a hearing, as the statute permits, to ascertain the facts from which to determine the amount appellant should be required to pay for the support of the child. The determination

and order were that appellant should pay to the clerk of the district court, on account of expenses incurred incident to its birth, the sum of $140.78, and for its support the sum of $4,320, or a total amount of $4,460.78. The amount was adjudged to become due and to be paid in installments of $20 each, the first on October 17, 1951, the second on November 1, 1951, and $20 on the first day of each month thereafter. The motion of appellant for a new trial was denied and an appeal taken by him to test the correctness of the order fixing the amount to be paid.

The court ordered appellant to pay "$140.78, for laying in expenses." He challenges this as not supported by evidence and contrary to law. The record sustains appellant. There is no evidence of any expense incurred or paid.

Appellant complains that the award made for the support of the child is excessive. The amount is $20 a month for 18 years. Appellant was employed as a truck driver for a net weekly wage of $43.02 or about $185 a month. There is no indication that he is not in good health and capable, or that his employment is not permanent. The primary objective of this proceeding is to secure the support and education of the child. Appellant emphasizes that he owes debts. This fact may properly be considered but his debt-paying record or capability is not a criterion by which the amount for the benefit of the child shall be determined. The most important and pertinent facts are the value of the property and the earning ability of the father. The child is entitled to support and education according to the standards and requirements of ordinary living in the community in which he is to be cared for and trained. A child handicapped socially and in other relations and activities by the stigma of parents without marriage ought not to be unduly restricted in its standard of living or education. It has a legal right to the benefits of ordinary care and training such as other children

usually receive to prepare and qualify them to meet the requirements of life. It is the responsibility and duty of appellant to provide these for his child. The amount which appellant should be adjudged to pay is committed by law to the discretion of the district court. Its award may not be disturbed unless discretion has been abused and the amount fixed is manifestly excessive. § 13-106, R. S. 1943; Clark v. Carey, 41 Neb. 780, 60 N. W. 78; Wurdeman v. Schultz, 54 Neb. 404, 74 N. W. 951; Gatzemeyer v. Peterson, 68 Neb. 832, 94 N. W. 974; Labertew v. Weeks, 111 Neb. 712, 197 N. W. 420.

The amount of an award in a case of this character should be in harmony with the circumstances shown by the proof giving due consideration to the means of the father, his ability to earn money, the means of the mother, her loss of opportunity to engage in income-producing activities because of the necessity of her attention to the child, and the health and condition of both parents.

The court after the adjudication of the paternity of the accused pursued the proper procedure. In every case of this nature the court after an adjudication that the accused is the father of the child should take evidence of the health, condition, property, and ability of the putative father to earn money; the health, condition, and means of the mother of the child; and all other pertinent facts and upon consideration thereof fix such amount as under all the circumstances is fair and just.

Discretion was not disregarded or misused in this case to the prejudice of appellant.

The judgment of the district court should be and it is reduced in the sum of $140.78 allowed for "laying in expenses." It should be and is in all other respects affirmed. The costs in this court should be and they are taxed to appellant.

AFFIRMED AS MODIFIED.

CHESTER A. SWANSON ET AL., APPELLEES, V. CITY OF FAIRFIELD, CLAY COUNTY, NEBRASKA, APPELLANT.
53 N. W. 2d 90

Filed May 2, 1952. No. 33131.

**Municipal Corporations.** Detachment of land from the corporate limits of a city may be denied where to detach would enhance the difficulties of city administration and would lessen the availability of contiguous urban areas for urban use.

APPEAL from the district court for Clay County: EDMUND P. NUSS, JUDGE. *Reversed and dismissed.*

*D. B. Massie* and *John A. Bottorf,* for appellant.

*S. W. Moger,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

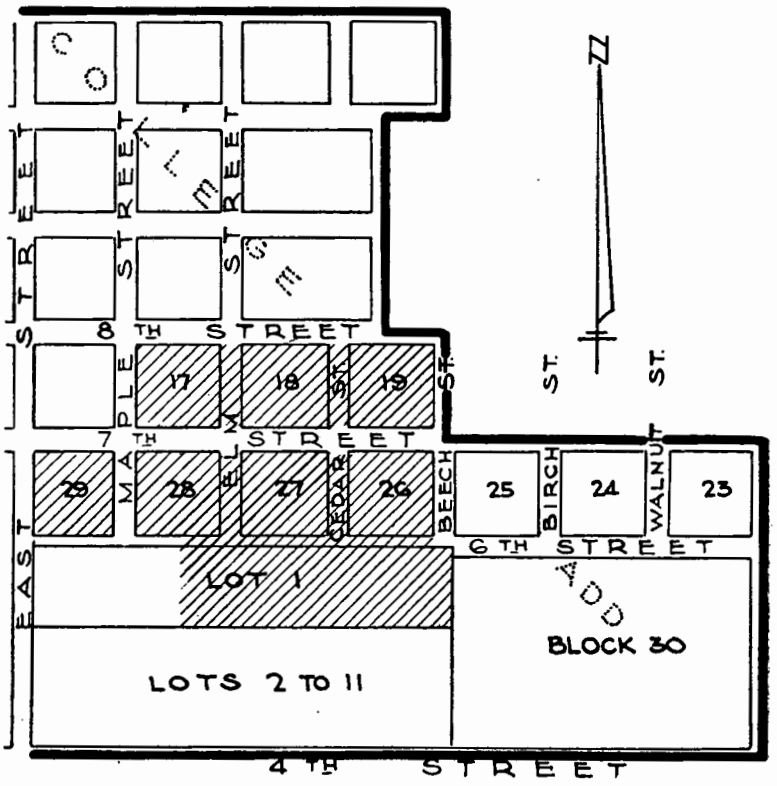
This is an action in equity to detach property from the corporate limits of defendant city. Issues were made and trial was had resulting in a decree detaching the property. After motion for a new trial was overruled, defendant appealed. We reverse the judgment of the district court and dismiss the action.

The cause is for trial de novo here. Kuebler v. City of Kearney, 151 Neb. 698, 39 N. W. 2d 415; Davidson v. City of Ravenna, 153 Neb. 652, 45 N. W. 2d 741; Runyan v. Village of Ong, 154 Neb. 127, 47 N. W. 2d 97.

For convenience we will refer to land within corporate limits as urban land, to land without such limits as rural land, and to the defendant as the city.

The land sought to be detached lies in the east area of the city. The boundaries of the city in that area and the land sought to be detached are shown on the following plat.

FAIRFIELD




The boundaries of the city are shown by heavy lines. The land sought to be detached is the hatched area. The streets and areas shown on the above plat are those appearing on the plat of the city. Each block as platted contains 12 lots with a 20-foot alley. The land was so platted in 1884. It appears that land to the northeast of this area was originally platted and was within the city but has since been detached from its corporate limits.

The land in blocks 17, 18, and 19 is enclosed by a fence, so that the platted streets and alleys between and

in those blocks are not in fact open to public use. Plaintiffs' home, barn, and outbuildings are on the northwest corner of block 17. This area is used largely for pasture. Likewise, blocks 26, 27, and 28, and lot 1 are in one enclosure, contain no buildings, and are used for farm crops.

Seventh and Eight Streets and Maple Street are open, used streets. Sixth Street is open on the south side of blocks 23, 24, and 25.

There are residences to the north, west, south, and east, averaging one or more to the block. The business district of the city is some ten blocks to the west and south of plaintiffs' property. All the land in the area is comparatively level and usable for residential purposes.

Plaintiffs acquired this land four and five years before this action was commenced. Originally they purchased all of lot 1, but during the pendency of this action they sold the west portion of lot 1 for residential purposes. They amended their petition so as to exclude the land so sold from this action.

Plaintiffs alleged in their petition that the land sought to be detached was used for agricultural purposes exclusively, and that there was no demand for the land or any part of it for urban purposes. The evidence sustains their contention. Plaintiffs further allege that there is no reasonable possibility that the city will ever extend to or use the property by actual residence. The evidence is that there has been one new home built in the area here involved in recent years and several houses have been remodeled. There is no evidence of immediate probable city growth.

Plaintiffs allege that the property is not benefited by city water and that there is not adequate fire protection. The evidence is that there are a water main, a fire hydrant, and a city street light one block west of plaintiffs' home; that plaintiffs can secure water service by compliance with ordinance provisions, the same as other properties; and that the city is equipped, able, and ready

to furnish adequate fire protection to plaintiffs' property.

The evidence is that the city maintains round-the-clock police protection for its inhabitants and that on the only occasion plaintiffs called for such protection, they received it.

Plaintiffs' evidence is that the streets are not maintained. There is evidence that work is being and has been done on Seventh and Eighth Streets and that Fourth Street is a well-maintained and used highway. Plaintiffs asked for and received gravel on Maple Street west of their home. The evidence is that the streets in this area do not receive the maintenance that streets closer to the business section receive.

Plaintiffs, relying on section 17-414, R. S. Supp., 1951, contend that justice and equity require that the land be detached. That statute provides that territory within and adjacent to the corporate limits may be disconnected if justice and equity require.

In the determination of what constitutes justice and equity, the facts in each case, under well-recognized principles of law, must to a very large extent determine that question. In re Chief Consolidated Mining Co., 71 Utah 430, 266 P. 1044.

We are asked to apply the unity-of-interest rule last stated in Runyan v. Village of Ong, *supra.*

We are here presented with a paucity of facts regarding the city. We are not able to relate the facts shown as to this land to the city's general situation in such a way under that rule as to find that justice and equity require that the land be disconnected from the city.

Under the facts here there is a controlling reason why this land should not be detached. If we treat the land sought to be detached as separate tracts consisting of blocks or half blocks, as the city would have us do, then it is clear that only a small part thereof is adjacent to the corporate limits. Plaintiffs would have us treat it as one body of land separated into three tracts by

existing streets which are subject to vacation under the provisions of other statutes. So treated, it is a body of land adjacent to the corporate limits only on a part of one side and extending into the city, and which, if detached, would leave it bordered by urban property on the north, west, south, and over half of its east borders. Stated otherwise, it would leave the city with an area to the south in an "L" shape generally one to three blocks wide and seven blocks long—a boot of urban land projecting into rural land. Obviously it would enhance the difficulties of city administration, street maintenance, and the maintenance of other city services, and would lessen the availability of contiguous areas for urban use.

In Anaconda Mining Co. v. Town of Anaconda, 33 Colo. 70, 80 P. 144, the statute related to land "being upon or contiguous to the border" of a city. Petition was made to disconnect an irregular tract generally 600 feet wide and 1,500 feet long, 150 feet of which touched the border of the city. The court held that such land did not lie upon the border or contiguous thereto. It reasoned that "The clear intent of the legislature was to permit persons owning property lying upon the border to disconnect from the town. The disconnection of property so lying upon the border would not be injurious; the limits of the town would be changed, but the town would not be divided. If twenty acres or more of land can be disconnected from a town where but a small portion lies upon the border, it follows that a tract can be disconnected by the simple expedient of connecting the territory with the border by a narrow strip. This the legislature did not intend should be done." The Supreme Court of North Dakota followed this decision in Mogaard v. City of Garrison, 47 N. D. 468, 182 N. W. 758, where a 35-acre tract was sought to be excluded leaving it rural land surrounded on three sides by urban land. The statute referred to land "upon the border and within the limits" of the city.

In Lincoln Addition Improv. Co. v. Lenhart, 50 N. D. 25, 195 N. W. 14, the court was presented with a petition for detachment involving a tract similar to the tract here involved. The court followed the Mogaard case and held: "In a manner, the exclusion of such territory will serve, in many ways, to make the land south of the excluded territory and within the limits of the city noncontiguous for jurisdictional and transportation purposes."

In City of Colton v. Parks, 71 S. D. 401, 24 N. W. 2d 919, that court was presented with a petition to detach bordering land from the city that was agricultural in character and without improvements, aside from fencing. The court denied detachment for the reasons, also summarized in 2 McQuillin, Municipal Corporations (3d ed.), section 7.27, page 336, that detachment of land may be denied where the exclusion of the land would destroy the symmetry of the municipality, enhance the difficulties of administration and planning improvements, and lessen the availability of isolated areas for urban uses. In Ball v. Village of Parma, 49 Idaho 40, 286 P. 24, the court defined the elements entering into the symmetry of a municipality.

We conclude that justice and equity do not require that the land involved be detached.

In Lee v. City of Harvard, 146 Neb. 807, 21 N. W. 2d 696, we were presented with a somewhat similar factual situation where the land sought to be detached was bounded on three sides by urban property. The contention was there advanced that the property was not adjacent to the corporate limits of the city. The opinion did not discuss or turn on that question. The result was in accord with our decision here.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSEBUD LUMBER AND COAL COMPANY, A CORPORATION, APPELLANT, V. FRANK P. HOLMS ET AL., APPELLEES.
53 N. W. 2d 82

Filed May 2, 1952. No. 33104.

SUPPLEMENTAL OPINION

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. See 155 Neb. 459, 52 N. W. 2d 313, for original opinion. *Motion for rehearing denied.*

*Patrick J. Heaton* and *Harold E. Connors,* for appellant.

*Kepler & Knicely,* and *Martin & Davis,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

The defendants' motion for rehearing attacked that part of the opinion holding that the evidence introduced by the plaintiff showing the prices charged for the materials claimed to have been furnished established prima facie the reasonable cost of the materials alleged to have been furnished, for the reason that this in effect holds that evidence of prices charged establishes prima facie value of the materials claimed to have been furnished. With reference to the testimony on this phase of the case we call attention to the original opinion.

The cases of Byrd v. Cochran, 39 Neb. 109, 58 N. W. 127, Crowell Lumber & Grain Co. v. Ryan Co., 110 Neb. 225, 193 N. W. 609, and text authorities cited and relied upon by defendants in their motion for rehearing are distinguishable and cannot control the situation presented.

The original opinion did not cite authorities on the proposition complained of by defendants. We deem the following rule sustained by the authorities now cited sufficient to meet the objection of the defendants as set forth in their motion for rehearing.

Under Chapter 52, article 1, Mechanics' Liens, sec-

tions 52-101 to 52-120 inclusive, R. S. 1943, and more specifically sections 52-101, 52-102, and 52-103, R. S. 1943, relating to mechanics' liens, an owner may not be compelled to pay more than the reasonable value of labor or materials furnished, and is not bound by the agreed prices between the contractor and the lien claimant, but such agreed prices may be taken as prima facie correct.

The foregoing is the general rule sustained by the leading cases of Lanier v. Lovett, 25 Ariz. 54, 213 P. 391, cited in 40 C. J., Mechanics' Liens, § 317, p. 257, wherein cases are cited from Arizona, California, Colorado, Oregon, and Pennsylvania. In the cited text, it is said: "* * * under statutes conforming strictly to the direct lien or Pennsylvania system, (which is like our own), the lien of a person other than the principal contractor is limited to the reasonable value of what was done and furnished, regardless of the price agreed upon between claimant and the contractor; but this rule does not apply to a person contracting directly with the owner; and even where, under the statutes, the value or the reasonable value of the labor or materials is the measure of the amount of the lien, yet where a price has been agreed upon by contract, such agreed value is sometimes deemed to be, at least prima facie, the value or reasonable value."

In 40 C. J., Mechanics' Liens, § 651, p. 460, the following is stated: "Where under the statute the owner can be held only for the reasonable value of labor and material furnished to the contractor, the burden of proving such reasonable value when controverted rests upon the materialman or subcontractor. However, the contract price may be prima facie evidence of the reasonable value."

In 57 C. J. S., Mechanics' Liens, § 174, p. 725, it is said: "However, in jurisdictions where the measure and extent of the amount of the lien of a claimant other than the original contractor is the value or reasonable value

of the labor or material furnished, the price fixed in the contract between claimant and the contractor is not controlling in fixing the amount of the lien, although such contract price is sometimes deemed to be, at least prima facie, the value or reasonable value within the meaning of the rule obtaining in such jurisdictions, * * *." See, also, 40 C. J., Mechanics' Liens, § 319, p. 258; 57 C. J. S., Mechanics' Liens, § 173, p. 722; 36 Am. Jur., Mechanics' Liens, § 150, p. 103; Mitchell Planing Mill Co. v. Allison, 138 Mo. 50, 40 S. W. 118, 60 Am. S. R. 544.

In the afore-cited authorities we have announced the rule that is applicable in this state to the objection made by the defendants in their motion for rehearing.

Motion for rehearing is denied.

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HENRY C. GLISSMANN ET AL., APPELLANTS, V. SERENA E. GRABOW ET AL., APPELLEES, IMPLEADED WITH HAROLD W. GLISSMANN, INTERVENER-APPELLANT.

CONSOLIDATED WITH O. M. CAMPBELL, APPELLEE, V. EMMA C. SCHLUTER ET AL., APPELLEES, HENRY C. GLISSMANN, APPELLANT.

53 N. W. 2d 94

Filed May 2, 1952. No. 33117.

1. **Evidence.** The doctrine that the court will take judicial notice of a final order made by it in another case which is so interwoven and interdependent with the pending case as to justify the application of it is an exception to the general rule recognized by the necessity of giving effect to a former holding which finally decided questions of fact and law.
2. **Judgments.** All matters in issue in a former action and judicially determined are conclusively put at rest by judgment therein and may not again be litigated in a subsequent action.
3. **Fraud.** In an original suit to annul a judgment, on the ground that it was fraudulently obtained, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision of the issues was not attributable to his own carelessness or inaction.

4. Trial. A party must, in preparing for trial, proceed on the assumption that his adversary will produce evidence to support his contention.
5. Judgments. If the evidence given on a former trial is not contained in the record under review, the court cannot determine whether the judgment rendered on such trial was the result of false testimony.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Affirmed.*

*Henry C. Glissmann,* pro se, *S. L. Winters,* and *Tesar & Tesar,* for appellants.

*Gray & Brumbaugh,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an action in equity by Henry C. Glissmann and Tena E. Glissmann against Serena E. Grabow and William H. Dorrance, sheriff of Douglas County, to vacate a judgment of the district court because as alleged it was obtained by fraud and false swearing of the judgment creditor, and to enjoin the enforcement and collection of the judgment. Harold W. Glissmann intervened in the case. The matters involved in the case last identified in the caption, not disposed of by agreement of the parties, will be concluded ipso facto by the decision of the appeal in the first case named in the caption. The contesting parties are Henry C. Glissmann, Tena E. Glissmann, and Harold W. Glissmann, appellants, and Serena E. Grabow, appellee.

The judgment sought to be set aside was rendered on the 6th day of October 1948. It was predicated on, and was required by, four opinions and decisions of this court in which the same parties interpleaded and the identical subject matter was involved. The opinions are reported in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617; 139 Neb. 362, 299 N. W. 225; 141 Neb. 288, 3 N. W. 2d 555; and 149 Neb. 131,

30 N. W. 2d 649. There have been three other cases in which the parties to this contest were concerned and in which some of the same subject matter was in controversy. These are Glissmann v. Orchard, 139 Neb. 344, 297 N. W. 612; 152 Neb. 500, 41 N. W. 2d 756; and State ex rel. Grabow v. Dineen, General No. 32572. The decision of this court in the first of these cases was made and became final before the judgment assailed in the present case was rendered. An extensive statement of the facts in the pending case is neither required nor justified because of the disclosure of the transactions of the parties affecting the subject matter to the minutest detail in the prior cases in this court.

The fraud charged against appellee as a basis for relief from the judgment is that she represented and testified in court that she was entitled to her share and also the share of her brother Henry C. Glissmann, appellant, in the estate of their father, Hans C. Glissmann, deceased; that appellant transferred his share to her by an instrument absolutely and unconditionally in consideration of appellee having negotiated for and secured a certain lease and option contract from a Mr. Orchard and his wife for the benefit of her brother; and that she secured the performance of the obligations thereof by pledging to Orchard and his wife the share of appellee in the estate of her father. Appellants allege that no contract or transaction in reference thereto by the appellant and appellee was made or was had and her claims, representations, and testimony in that regard were false and induced and resulted in the judgment in her favor. The district court found that appellants had not sustained their petition and it was by the court dismissed.

All of the claims made by the appellants in their favor in the petition in this case except the allegations thereof charging Serena E. Grabow with fraud and perjury had been, as shown by the decisions of this

court cited herein, adjudicated against appellants before this case was commenced.

The instrument dated January 24, 1929, executed by Henry C. Glissmann and Serena E. Grabow and approved and confirmed by Tena E. Glissmann evidences that Henry C. Glissmann for a recited consideration "hereby sells, assigns and sets over unto said Serena E. Grabow, her heirs or assigns, all right title and interest in and to estate or any share therein of the late Hans C. Glissmann, which he, Henry C. Glissmann, second party herein, may now have or hereafter may accrue to him as heir or creditor of the late Hans C. Glissmann, his father now deceased. And the said second party hereby grants to first party, her heirs or assigns, full right and authority to receive, receipt for or acknowledge any or all necessary papers or matters in connection with or rights accruing in and to said share * * * which share is by these presents assigned herein to said first party, and that said first party in the settlement of said estate or receiving of said share may do the same as second party may have done in the premises * * *."

The claim was made by appellee in a pleading filed by her on May 19, 1938, in the case of Glissmann v. Orchard, 139 Neb. 344, 297 N. W. 612, that her share in the estate of her father pledged by her to Orchard and his wife was her property and should be returned to her, and she asked the court to award it to her and require Orchard and his wife to surrender and deliver to her all property pledged by her and held by them as collateral on account of the option and the lease. In an answer and cross-petition made by appellee on November 9, 1938, in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, she alleged that she became the owner of the share of Henry C. Glissmann by the instrument dated January 24, 1929; that she was the owner thereof, and of any money realized or paid on account thereof; that she had served a copy of the instrument on each of the parties interested in the property con-

stituting the subject matter thereof or of the proceeds therefrom; and that she gave them each notice that she was such owner. She asked the court to adjudge that she was the owner and she was awarded a judgment to that effect. These cases were consolidated for trial, were heard and decided on the same evidence in the district court, and were appealed and decided on one record in this court. Appellants were parties to these cases and they knew that appellee was, when she made her pleadings therein in 1938, claiming to be not only the owner and entitled to the benefit of the share of her brother by virtue of his transfer of it to her but also of her share in the estate of her father.

The final order of the court in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, on the first appeal thereof, was made on July 3, 1941, and a mandate was issued on the 6th day of October 1941. Thereafter on the 4th day of November 1941, appellants made, in the district court, an "APPLICATION FOR STAY OF PROCEEDINGS" because they were going to file their appeal to this court that its decision be clarified and a petition to set aside the judgment rendered on the contention that it had been obtained on the fraud and misrepresentation of Serena E. Grabow; that it would be inequitable and unjust for her to retain her share and obtain the share of her brother which was the meaning and effect of the decision of this court; and that, if the judgment of the court meant the total one-eighth interest of appellee, it included the amount due on the Happy Hollow contract, the Shuler & Cary contract, the balance of the interest in said estate held during the lifetime of the widow of Hans C. Glissmann, deceased, and all payments made to appellee by the trustees since March 28, 1929. They sought a stay until an application for a new trial based on fraud and misrepresentation by appellee could be made and acted on in the district court, and until a petition was made in the

Supreme Court to set aside the judgment for fraud of the prevailing party.

The evidence produced on the trial of this case by appellants in support of their allegations of fraud on the part of appellee was known to them, or they were chargeable with knowledge thereof, and it could have been produced by reasonable alertness and diligence on their part as early as the time when they filed the application for a stay of proceedings in 1941. The explanation of appellants alleged in the petition that "some of the testimony which these defendants (appellants) wish to present was unknown to them * * * and was only discovered within the last few days" is a conclusion and constitutes no legal excuse for their delay in attempting to establish the fraudulent and illegal conduct attributed to appellee by them as early as the year 1941, more than seven years before this suit was brought. The justification for their silence and inaction in this regard, set forth in the petition in this case, is "that said testimony was not introduced in the proceeding before the Master, because that hearing was based upon the previous decision of the Supreme Court, that she (appellee) was only to get one (1) share * * *." The hearing before the master was within the period of May 1 and July 3, 1946. At any rate this part of the petition shows that appellants had "said testimony" before July 3, 1946, and that was more than two years before the time they assert in another part of their petition that it "was only discovered within the last few days" meaning a few days before November 8, 1948.

Appellants have not shown diligence or legal excuse for silence and inaction. In Barr v. Post, 59 Neb. 361, 80 N. W. 1041, 80 Am. S. R. 680, it is said: "In an original suit to annul a judgment, on the ground that it was fraudulently obtained, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision of the issues was not attributable to his own carelessness or

inaction. * * * A party must, in preparing for trial, proceed on the assumption that his adversary will produce evidence to support his contention. * * * Where all the evidence given on a former trial is not contained in the record under review, the court can not determine whether the judgment rendered on such trial was the result of false testimony." The appellants have in this case failed to meet each of these requirements. In the recent case of Davies v. De Lair, 148 Neb. 395, 27 N. W. 2d 628, this doctrine was again approved and applied: "It is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary, but he must go farther and show that the failure to obtain a just decision is not attributable to his own fault or negligence. * * * It is, as a rule, not sufficient to allege generally that due diligence has been used, but the facts constituting diligence must be set out." See, also, Scudder v. Evans, 105 Neb. 292, 180 N. W. 254; Gutru v. Johnson, 115 Neb. 309, 212 N. W. 622; Weber v. Allen, 121 Neb. 833, 238 N. W. 740; In re Guardianship of Protsman, 136 Neb. 192, 285 N. W. 494; County of Lincoln v. Provident Loan & Inv. Co., 147 Neb. 169, 22 N. W. 2d 609.

The right of appellee to recover the judgment sought to be vacated was determined not by oral testimony but primarily and basically on consideration of and conclusions drawn from a written instrument prepared by Henry C. Glissmann. After its execution by him, his wife, and Serena E. Grabow, it was by him filed for record. That instrument has not been impeached. Its validity was adjudicated years before the pending litigation was commenced. The charge of misconduct of appellee producing the judgment predicated on that instrument was first made by appellants in November 1941. It appears to have then been the product of desperation and the hopelessness of the situation has not lessened with the passing of time or the vicissitudes

of additional litigation. The refusal of the trial court to vacate the judgment is sustained by the record.

The intervention of Harold W. Glissmann concerned his claim that his rights to and ownership of the share of Henry C. Glissmann in the estate of his father were superior to any rights thereto of any other party to this case. The basis of his claimed ownership of the share of his father is an assignment by Henry C. Glissmann to his wife on October 15, 1928, an assignment by her to the intervener on November 3, 1930, the assignment to him of a judgment of the Bank of Benson against Henry C. Glissmann assigned by it to George Boland and by him to the intervener on June 10, 1938, a sale on an execution on the judgment of the one-eighth interest of the proceeds due Hans C. Glissmann at his death under the Happy Hollow Club contract and by him given by will to his son Henry C. Glissmann, and a deed issued to the intervener by the sheriff.

There had been a final adjudication against the intervener before his intervention in this case on November 9, 1950. He claimed the share of his father by the assignment from his mother and also a lien on the share of his father by virtue of the Bank of Benson judgment and its assignment to him in one of the earlier Glissmann cases. Appellee claimed therein that she owned the share of the estate of Hans C. Glissmann given to his son Henry. This court found against Harold W. Glissmann, in favor of Serena E. Grabow, and awarded her judgment for the whole of the property in controversy. Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, on rehearing, 139 Neb. 362, 299 N. W. 225. That this is a correct appraisal of that decision is confirmed in the opinion of this court nearly seven years later on another appeal of the case by this assertion therein: "The effect of this at this time is to say that Serena E. Grabow's assignment was adjudicated to be and was an absolute conveyance to her of the interest of Henry C. Glissmann in the estate of his deceased father which

adjudication is final and conclusive; that Serena E. Grabow obtained a judgment for the unpaid portion of this interest which judgment is final and conclusive; and that Serena E. Grabow also obtained an adjudication that the portion of the interest paid to the three Glissmanns after March 28, 1929, belonged to her which adjudication was also conclusive and final. The opinion left nothing for later determination except the determination of the amount or amounts which had been received by the three Glissmanns and directed that judgment be rendered for this or these amounts. * * * We must say therefore that Serena E. Grabow is, by valid and now conclusive judgment of this court, entitled to the entire Henry C. Glissmann interest in the estate of Hans C. Glissmann * * *." Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649.

The contention of intervener that because the case of Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, was dismissed as to him that therefore this court made no adjudication against him is, as shown by the quotation last made, wholly without foundation. See, also, Anderson v. Anderson, *ante* p. 1, 50 N. W. 2d 224.

The judgments of the district court in the cases involved in this appeal should be and they are affirmed.

AFFIRMED.

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WILLIAM E. HOWELL, APPELLANT, V. HERBERT H. HANN, WARDEN NEBRASKA STATE PENITENTIARY, APPELLEE.
53 N. W. 2d 81

Filed May 2, 1952. No. 33158.

1. **Habeas Corpus.** It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it and if it fails to state a cause of action to enter an order denying the writ.
2. **Criminal Law.** Where a person accused of crime is found within the territorial jurisdiction where he is so charged, the right to put him on trial for the offense charged is not impaired by the

fact that he was brought from another jurisdiction by illegal means such as unlawful force or fraud.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

*William E. Howell,* pro se, for appellant.

*Clarence S. Beck,* Attorney General, and *Clarence A. H. Meyer,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

Appellant filed his petition for a writ of habeas corpus in the district court for Lancaster County directed to Herbert H. Hann, warden of the penitentiary of the State of Nebraska. The trial court found that the petition did not allege sufficient facts to constitute a cause of action and entered an order of dismissal.

It is shown by the petition and the records incorporated therein that appellant on October 11, 1947, while confined in the county jail of Thayer County awaiting trial on a charge of burglary, feloniously broke such custody and escaped. He was thereafter apprehended in the city of Delehant, Texas, where, it is alleged, that "he was beaten with a rubber hose and forced to sign a waiver of extradition back to the State of Nebraska." The information charging the crime of jail breaking alleges in addition thereto that the appellant had previously been convicted of crime on three separate occasions, three times sentenced and three times committed to prison for terms of not less than one year, all of which constituted the appellant an habitual criminal under the laws of this state. Appellant, after being advised by counsel of his own choosing, entered a plea of guilty to the charge of jail breaking. The state thereupon offered duly authenticated copies of the judgments and commitments sentencing and committing appellant to the penitentiary for one year or more in each of the

three previous convictions alleged. The trial court thereupon adjudged appellant to be an habitual criminal and sentenced him to serve ten years in the State Penitentiary.

Appellant's petition for a writ of habeas corpus is based on allegations that he was returned to Nebraska from Texas by the use of force and fraud, and that his conviction thereafter was therefore a nullity. For the purposes of this appeal we must assume that the allegations of force and fraud are true as pleaded.

This court has held many times that a petition for a writ of habeas corpus must state a cause of action or the court will be required to enter an order denying the writ. Stapleman v. Hann, *ante* p. 410, 51 N. W. 2d 891; Goedert v. Jones, 150 Neb. 783, 36 N. W. 2d 119. The only question presented by this appeal is whether or not the allegations of force and fraud in procuring the return of the appellant to this state to stand trial on the charge of jail breaking lodged against him are sufficient to require the issuance of the writ.

It is not disputed that the district court for Thayer County had jurisdiction of the offense, jurisdiction of the person of the appellant, and that the sentence was within the power of the court to impose. Under such circumstances, does the use of force and fraud in procuring the return of one to the state to answer a criminal charge have the effect of invalidating the sentence and commitment and require the issuance of a writ of habeas corpus, for the reason that it is violative of state or federal constitutional guarantees?

This court and the Supreme Court of the United States have answered this question in the negative on many occasions. In Frisbie v. Collins, 342 U. S. 519, 72 S. Ct. 509, 96 L. Ed. 396, it was stated: "This court has never departed from the rule announced in Ker v. Illinois, 119 U. S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by

reasons of a 'forcible abduction.'" It is a general rule that where a person accused of a crime is found within the territorial jurisdiction where he is so charged, the right to put him on trial for the offense charged is not impaired by the fact that he was brought from another jurisdiction by illegal means such as kidnaping, unlawful force, fraud, or the like. Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932; Lascelles v. Georgia, 148 U. S. 537, 13 S. Ct. 687, 37 L. Ed. 549; In re Johnson, 167 U. S. 120, 17 S. Ct. 735, 42 L. Ed. 103. The district court therefore correctly held that appellant's petition did not state a cause of action. The petition was properly dismissed.

AFFIRMED.

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JOHN J. JURGENSEN ET AL., APPELLANTS, V. JAMES S. AINSCOW ET AL., APPELLEES.
53 N. W. 2d 196

Filed May 9, 1952. No. 33144.

1. Easements. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate.
2. ———. The use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period.
3. ———. To prove a prescriptive right to an easement all of the elements to a prescriptive use must be generally established by clear, convincing, and satisfactory evidence.
4. ———. Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive.

5. ———. Acquiescence on the part of the owner which is necessary to acquisition of a prescriptive easement means passive assent or submission, quiescence, consent by silence.
6. ———. If the use of an easement has been open, adverse, notorious, peaceable, and uninterrupted, the owner of the servient tenement is charged with knowledge of such use, and acquiescence in it is implied.
7. ———. The extent and nature of an easement is determined from the use actually made of the property during the running of the prescriptive period.
8. ———. The term "exclusive use" does not mean that no one has used the driveway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others.
9. **Adverse Possession: Easements.** "Actual possession" means the corporeal detention of the property when used in relation to adverse possession.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

*O'Sullivan & Schrempp,* and *David S. Lathrop,* for appellants.

*Burbridge & Burbridge, Schall, Robinson, Hruska & Garvey,* and *William Comstock,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

The plaintiffs, John J. Jurgensen and Nellie C. Jurgensen, husband and wife, are the owners of Lot 15 in Block 5, Hanscom Place, an addition to the city of Omaha, Douglas County, Nebraska. They brought this action in equity in the district court for Douglas County against James S. Ainscow and Betty S. Ainscow, husband and wife, the owners of Lots 13 and 14 in Block 5 of the same addition, defendants, to enjoin the defendants from interfering with the plaintiffs' use of plaintiffs' claimed prescriptive easements over defendants' property. Trial was had to the court. The court

entered judgment finding generally in favor of the defendants, and dismissed the plaintiffs' petition at plaintiffs' costs. The court further made a finding that the evidence failed to establish that the easements claimed by the plaintiffs were acquired through adverse use, but that the evidence did show that the use of the passageways in question by the plaintiffs and their predecessors in title was permissive only and not under claim of right. The plaintiffs filed a motion for new trial which was overruled. From this order plaintiffs appeal.

For convenience we will refer to the parties as they were designated in the district court, and as occasion requires by their first or last names. In referring to the description of the real estate of the plaintiffs and the prescriptive easements involved claimed to be over defendants' land, the plaintiffs' property will be designated Lot 15, and the defendants' property Lots 13 and 14.

The record shows that plaintiffs John J. Jurgensen and his wife Nellie C. Jurgensen acquired title to Lot 15 by warranty deed on April 1, 1935. They moved into said premises either on April 3 or April 4, 1935, and have remained owners of said real estate since that time. By exhibit No. 4, a chart appearing in the record, the plaintiffs' house is located on the west end of Lot 15 facing on Thirty-first Street, and is 100 feet north of Poppleton Avenue. The plaintiffs' garage is in the northeast corner of Lot 15. At the time plaintiffs entered into possession there were driveways leading from their property to the south and to the west. The claimed easement driveways are described as follows: A strip of ground 9 feet in width running from east to west over the south 9 feet of the north 15 feet of Lot 14, which said strip and easement runs for a distance of approximately 140 feet in an east-west direction, the west end of the easement being the curb line of Thirty-first Street and the east end of the easement being a point where said easement and the driveway join a second driveway

easement, which runs north and south, more specifically described as a strip of ground running north and south over the west 6 feet of the east 9 feet of Lots 13 and 14, which said strip constitutes a driveway easement approximately 100 feet in length, the south end of said driveway easement being the north curb line of Poppleton Avenue and the north end of the said easement being the south property line of Lot 15. There were curb cut-outs to both driveways present at the time plaintiffs acquired the property, which are now in the same condition.

The plaintiff testified that he has owned an automobile during the time he has resided on Lot 15, and has used the driveways continually, both in the daytime and nighttime. He had no agreement with the owners of Lots 13 and 14 to use the property. He was told by an agent of the realty company from whom he purchased the property that these driveways could never be closed, and that he had the right to use them. He paid nothing for their use, and paid no taxes on Lots 13 and 14. Plaintiff further testified that during the period of time the plaintiffs used the driveways, from April 3, 1935, to sometime in October 1950, he put cinders and ashes on the driveways, kept the grass mowed with a mower and on occasions used a scythe, and that in the use of the driveways he used the one that was most convenient for his purposes. With respect to the north-south driveway, the plaintiff testified that it is a strip approximately 6 feet wide and is 3 feet from the east boundary line of Lots 13 and 14. It tapers or angles a little to the west from the tree line on the east property line of the lots and forms a bottleneck with the east-west driveway in a cement drive in front of the plaintiffs' garage on Lot 15. This testimony indicates that the north-south driveway is not in a straight line. This undoubtedly is due to the trees on the north-south drive and the position of the same as the testimony will show later.

The defendants became the owners of Lots 13 and 14 on May 6, 1950, and in October 1950, began construction of two six-plex apartments on Lots 13 and 14, and two-car garages to accommodate each apartment. The construction of the apartment houses was completed and they were tenanted at the time of trial. The garages were not constructed. By virtue of the construction of the garages the driveway easements claimed by the plaintiffs were blocked for ingress and egress by automobile to their premises. This was done by grading up the dirt on the east-west driveway and pushing it past the driveway to the entrance of plaintiffs' garage. Plaintiff John J. Jurgensen requested the contractor in charge of the work to open a driveway and was informed it would be open in a few days. Plaintiff Nellie C. Jurgensen made similar requests of the contractor and was informed that the driveways would be open in a few days. It appears that the plaintiffs' house is located on the west end of Lot 15 and the property then drops to a lower level, or is terraced down to the garage.

The defendant James S. Ainscow, engaged in the management department of a real estate firm, testified that at the time the lots were purchased by him and his wife they were covered with weeds and he paid an assessment to the city for cutting the weeds for that year. When he purchased the lots he saw no evidence of travel by automobile over the strip of ground 9 feet in width running from east to west over the northern portion of Lot 14. He further testified that it would have been practically impossible to travel that strip of ground on account of the weeds and an automobile body lying in a portion of the claimed easement which he had removed, and on account of a big drop-off running east toward the plaintiffs' garage; and that in the wintertime it would be slippery and hard driving because of the fall of the ground. There is a cut 6 feet in width in the curb on Thirty-first Street which is an old carriage driveway. He then identified certain trees on the

north-south driveway with reference to the eastern boundary of Lots 13 and 14. The first tree is 8 feet west of this boundary, the second tree 4 feet, the third tree 5 feet, and the fourth tree 8 feet west of the eastern boundary. These trees are about 40 feet in height. The circumference of the first tree is 3 feet, the second tree 2½ feet, the third tree 2½ feet, and the fourth tree 3 feet. He testified that it would be impossible to drive a car over that approximate territory avoiding the trees. In other words, it would only be possible to go across that line and get into the plaintiffs' garage by swerving around the trees. From the time the defendants purchased the property he was on it at least twice a month, and when the construction started he was on it several times during each day and observed no one using the driveways. He further testified that he had been acquainted with the premises for 52 years, and that the cut in the curb on the north-south driveway on Poppleton Avenue had been there for that period of time.

The witness James Ward testified that he put in a victory garden on Lots 13 and 14 in 1943 and 1944, and was present on the lots two or three times each week. He remembered that cars would drive into the east-west driveway and park, but to the best of his recollection the north-south driveway was not used while he was there.

Mrs. Ainscow corroborated her husband's testimony to the effect that it would be impossible to drive an automobile over their property to the plaintiffs' garage.

Merritt W. Kevan testified to the ownership of Lots 13 and 14 in the spring of 1947, and that he deeded the same to the defendants; that he is familiar with the property; that he was over it once a week during the time he owned it; and that he never granted permission to anyone to use the driveways and no one did during the time he owned the same. The driveway on the north was overgrown with weeds, and it would have

been impossible for any car to get through on account of the overgrowth of brush and trees which were at least 10 years old. He had been requested to cut the weeds on the driveway to the east, and there was no evidence of either driveway being used, as the weeds thereon were 5 or 6 feet high. He further testified that no cinders were placed on the driveways when he owned the lots up until May 1950; that there were some indentations in the ground which were too narrow for car tracks; and that since Ainscow purchased the property he had gone by it once every two weeks and there was no evidence of plaintiffs' garage being used.

The plaintiff John J. Jurgensen, in rebuttal, testified that he hauled six or eight loads of cinders which he placed on the driveways; that he kept the grass cut in the driveways with a mower; that the grocery boy and the trash man used the drives; that he cut the weeds every year; that he had noticed the city cutting weeds on occasions; and that he used the driveways constantly as occasion required, sometimes three or four times a day.

Plaintiff Nellie C. Jurgensen testified to a telephone conversation with Mrs. Ainscow wherein she identified herself and where she lived, and told Mrs. Ainscow that she wanted the drive cleared. She wanted to talk to Mr. Ainscow. Mrs. Ainscow testified that a woman called her one evening before dinner, identified herself, asked when they were going to clear the driveway of the obstructions, and named two individuals who had let plaintiffs use the driveway. What interest these individuals may have had in the property is not shown. This conversation was either in the latter part of May or the first part of June 1951.

The witness Anna Kuder testified that she purchased the house at 3008 Poppleton Avenue 25 years ago and has lived there for 12 years. This house is located 2 or 3 feet east of the north-south driveway. From the time she lived there up to the time the driveways were

blocked, the plaintiff always used the north-south driveway. Once in a while plaintiff went the other way, but defendants wanted to close that driveway off. The plaintiff cindered the driveway, and she knew that he did because the cinders would run onto her sidewalk and she would have to sweep them off. There never were any weeds on the driveway because the plaintiff cut them with the lawn mower. This driveway had never been closed before. The grocery boy used to deliver groceries and would drive in on Poppleton Avenue and out on Thirty-first Street. She further testified that the plaintiff shoveled snow off the driveway on occasions.

Jeanette Kevan testified that she was familiar with the lots and planned to build on them about three years ago; that she would often drive by the property; that she never noticed the plaintiff John J. Jurgensen shovel any snow at the time they owned the property; that there were no signs or markings to indicate any use of the property as a driveway; and that there were weeds and grass growing on both driveways during the time she and her husband owned the property.

There is evidence from a witness who occupied the premises in which the plaintiffs now live from 1908 to 1925. She testified that they had permission to use these premises during that period of time. However, it will be noted that this was 10 years prior to the time the plaintiffs acquired the property.

The plaintiffs assign as error (1) that the judgment and decree of the trial court are not sustained by the evidence; and (2) that there was no competent evidence before the court that the use by the plaintiffs of the easements in question was permissive in character and not under claim of right.

The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse,

under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period. See, Stubblefield v. Osborn, 149 Neb. 566, 31 N. W. 2d 547. See, also, 28 C. J. S., Easements, § 10, p. 645.

To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence. See, 28 C. J. S., Easements, § 70, p. 743, cases cited under note 2; 19 C. J., Easements, § 197, p. 964, note 33; 17 Am. Jur., Easements, § 73, p. 982; Beckley Nat. Exch. Bank v. Lilly, 116 W. Va. 608, 182 S. E. 767, 102 A. L. R. 462.

The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of the easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive. See, 17 Am. Jur., Easements, § 72, p. 981, and cases cited under note 12. See, also, Majerus v. Barton, 92 Neb. 685, 139 N. W. 208; Moll v. Hagerbaumer, 98 Neb. 555, 153 N. W. 560; Dormer v. Dreith, 145 Neb. 742, 18 N. W. 2d 94; Stubblefield v. Osborn, *supra*. In the instant case there is no competent evidence appearing in the record to show the plaintiffs' use of the claimed easement was by permission of the owners of the servient estate.

It is presumed, however, that every man knows the condition and status of his land; and if anyone enters into open and notorious possession of an easement therein under a claim of right, the owner is charged with knowledge thereof. See, 17 Am. Jur., Easements, § 65, p. 976.

Acquiescence on the part of the owner which is necessary to acquisition of a prescriptive easement means pas-

sive assent or submission, quiescence, consent by silence. See, Dartnell v. Bidwell, 115 Me. 227, 98 A. 743, 5 A. L. R. 1320; Davis v. Wilkinson, 140 Va. 672, 125 S. E. 700.

If such user has been for the requisite time open, notorious, visible, uninterrupted, and undisputed under claim of right adverse to such owner, he is charged with knowledge of such user and his acquiescence in it is implied. See, 2 Thompson on Real Property, § 512, p. 94, cases under note 18, also § 510, p. 89; Hester v. Sawyers, 41 N. Mex. 497, 71 P. 2d 646, 112 A. L. R. 536.

The extent of an easement, however, is determined from the use actually made of the property during the running of the prescriptive period. It in fact determines the nature of the easement acquired. A trial court may determine the extent of an easement arising by prescription in an injunction action and restrain interference with rights found to exist by virtue of the finding so made. The servient owner of land subject to an easement may make such use of it as he sees fit, subject only to the right of the dominant owner of the easement to use it for the purposes out of which the right arose. See, Paloucek v. Adams, 153 Neb. 744, 45 N. W. 2d 895. See, also, 17 Am. Jur., Easements, § 59, p. 971; Dunbar v. O'Brien, 117 Neb. 245, 220 N. W. 278, 58 A. L. R. 1033.

Defendants in their brief contend that plaintiffs' use was not exclusive for the reason that a grocery delivery boy and a trash man used the driveways in question. The term "exclusive use," however, does not mean that no one has used the driveway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others. See, 17 Am. Jur., Easements, § 64, p. 976; Thompson v. Bowes, 115 Me. 6, 97 A. 1, 1 A. L. R. 1365; Annotation, 111 A. L. R. pp. 223, 224.

The evidence with reference to the plaintiffs' claimed easement by prescription east and west over the defendants' land is insufficient to meet the requirements

of proof in such respect. In view of the evidence and the afore-cited authorities we conclude the evidence is sufficient to sustain the plaintiffs' claim to an easement by prescription and adverse use over the defendants' land for a driveway running north and south to permit ingress and egress to and from their garage.

This brings us to the following proposition raised in the defendants' answer. The defendants' answer alleges in substance that their title and the title of their immediate and remote grantors was acquired by sheriff's deed dated November 16, 1944, recorded December 5, 1944; and that said deed was delivered pursuant to proceedings valid and regular in the case of County of Douglas, plaintiff, v. James E. Allen et al., in the district court of Douglas County, Nebraska. This was a tax foreclosure action. Defendants plead that the effect of the action estopped any person or persons having or claiming any interest whatsoever in and to said real estate. The defendants' answer also alleges that at the time the instant case was filed sections 77-1934 and 77-1935, R. S. Supp., 1949, were in full force and effect and plaintiffs failed to comply with said sections and also failed to comply with sections 25-2001 and 25-2008, R. S. 1943, therefore plaintiffs should be estopped and enjoined further in the instant case.

A stipulation appears in the record showing the chain of title to Lots 13 and 14, Block 5, Hanscom Place as the same appears in the office of the register of deeds, and also shows the tax foreclosure action and proceedings in connection therewith mentioned in the defendants' answer. The plaintiffs stated they would object to the materiality of the stipulation in the event it would be claimed the tax foreclosure proceedings were binding on them. It was agreed by defendants' counsel that the stipulation reflected only what the abstract shows with reference to the title, no legal conclusion to be drawn therefrom. To set out the stipulation would unnecessarily lengthen this opinion.

Basically, the question is whether or not service was had on these resident plaintiffs by publication, as provided for by law. The sections of the statute with reference to this kind of service were not pleaded by the defendants in their answer and do not appear in the record.

Sections 25-321 and 25-517, R. R. S. 1943, and section 25-518, R. S. Supp., 1949, define the manner in which service by publication may be had on resident defendants whose names are unknown and whose place of residence cannot be ascertained by diligent investigation, and who claim or might claim a right, title, or interest in and to the real estate involved.

We make reference to that part of section 25-321, R. R. S. 1943, as follows: "Judgments and decrees against persons so designated and made defendants and served by publication as herein provided shall be conclusive as against all persons *who are not in actual possession of such property* and whose ownership of, interest in, rights or title to, or lien upon such property does not appear of record in or by their respective names in the county wherein such property is situated." (Emphasis supplied.)

It appears from the record that the plaintiffs were in actual possession of the easement in question running north and south over the defendants' land prior to and at the time of the tax foreclosure proceedings. For actual possession, no particular act is required. What is sufficient to meet the requirements depends upon the character of the land and all of the circumstances of the case. See, Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404. The plaintiffs' use of the east portion of the defendants' land as a driveway north and south to permit ingress and egress to their garage for the full prescriptive period of time was visible, and it is apparent the plaintiffs intended to appropriate such portion of the defendants' land to that useful purpose.

In Cutting v. Patterson, 82 Minn. 375, 85 N. W. 172, it was said that actual possession means possession in

fact, effected by actual entry upon the premises and actual occupancy. As used in the statute the word "actual" is in opposition to the word "virtual" or "constructive," and calls for an open, visible occupancy.

In Wallace v. Sache, 106 Minn. 123, 118 N. W. 360, the court said: "The cases in which the exact meaning of the term 'actual possession' is considered are to be found principally in the law of adverse possession. * * * 'Actual possession' is a tangible fact. 'Actual possession' means the corporeal detention of the property when used in relation to adverse possession." See, also, Carey v. Cagney, 109 La. 77, 33 So. 89; Churchill v. Onderdonk, 59 N. Y. 134; Cleveland v. Crawford, 7 Hun 616; Newcome v. Crews, 98 Ky. 339, 32 S. W. 947; Lillianskyoldt v. Goss, 2 Utah 292; Moulton v. Sidle, 52 F. 616; Green v. Cumberland Coal & Coke Co., 110 Tenn. 35, 72 S. W. 459; 2 Words and Phrases (Perm. Ed.), p. 295; Hallowell v. Borchers, *supra*.

In the light of the afore-cited authorities defining actual possession as it applies to adverse possession, we conclude that the plaintiffs were in actual possession of an easement by prescription running north and south over the defendants' land as contended for by them. Therefore, any judgment or decree that may have been rendered against the plaintiffs as defendants in the tax foreclosure proceedings by virtue of service by publication, if such be the fact, would in no event be conclusive as against these plaintiffs.

The sections of the statute heretofore mentioned as appearing in the defendants' answer, wherein it is alleged the plaintiffs failed to comply therewith, are not applicable to the instant case, nor is the authority cited in defendants' brief on the same proposition applicable.

We conclude that the plaintiffs are entitled to a driveway easement running north and south over the west 6 feet of the east 9 feet of Lots 13 and 14 of the defendants' property, 100 feet in length, as shown by the evidence, to permit ingress and egress to and from the

plaintiffs' garage. The judgment of the trial court is reversed and the cause remanded with directions to the trial court to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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ROMAN P. MYSZKOWSKI, APPELLANT, V. WILSON AND COMPANY, INC., APPELLEE.
53 N. W. 2d 203

Filed May 9, 1952. No. 33173.

1. **Workmen's Compensation: Appeal and Error.** On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.
2. **Workmen's Compensation.** An employee is entitled to recover compensation under the provisions of the workmen's compensation law when he suffers injury as the result of an accident arising out of and in the course of his employment.
3. ———. The burden is upon him to establish that fact by a preponderance of the evidence.
4. ———. There must be a causal connection between the employment and the injury before recovery can be allowed.
5. ———. Whether an accident arises out of and in the course of employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
6. ———. Under the Workmen's Compensation Act the words "arising in the course of the employment" relate to the time, place, and circumstances under which an accidental injury occurs, and the term "arising out of the employment" refers to the origin or cause of the accidental injury.
7. ———. An assault is an "accident" within the meaning of the Workmen's Compensation Act when from the point of view of the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another.
8. ———. Where the nature of the employment is such as to expose a worker to a wrongful act by another worker, which may reasonably be said to have been induced by the peculiar conditions of the employment, the manner in which it was carried on, and the appliances required, such an act may reasonably be said to "arise out of the employment."
9. ———. Where the disagreement arises out of the employer's

work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Reversed and remanded with directions.*

*August Ross* and *Theodore L. Kowalski,* for appellant.

*Floersch & Floersch,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from an order of the district court for Douglas County denying a workmen's compensation claim made by Roman P. Myszkowski against his employer, Wilson and Company, Inc.

"On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record." Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212.

An employee is entitled to recover compensation under the provisions of the workmen's compensation law when he suffers injury as the result of an accident arising out of and in the course of his employment (see section 48-109, R. S. 1943), but the burden is upon him to establish that fact by a preponderance of the evidence. See, Solheim v. Hastings Housing Co., *supra;* Beam v. Goodyear Tire & Rubber Co., 152 Neb. 663, 42 N. W. 2d 293.

"There must be a causal connection between the employment and the injury before recovery can be allowed, * * *." Bell v. Denton, 136 Neb. 23, 284 N. W. 751.

"Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved." Simon v. Standard Oil Co., 150 Neb. 799, 36 N. W. 2d 102.

"* * * under the Workmen's Compensation Act the words 'arising in the course of the employment' relate to the time, place, and circumstances under which an accidental injury occurs, and the term 'arising out of the employment' refers to the origin or cause of the accidental injury." Withers v. Black, 230 N. C. 428, 53 S. E. 2d 668. See, also, Scholl v. Industrial Comm., 366 Ill. 588, 10 N. E. 2d 360, 112 A. L. R. 1254.

The record shows that on May 9, 1950, claimant was employed by appellee as an electric-lift-tractor operator. Among appellee's employees on that date was a meat puller by the name of Johnnie Price. Prior to May 9, 1950, these two, while employees of appellee, had had some difficulties arising out of their work relations. About six months before an argument occurred between the two as a result of which Price put claimant in a tank of meat. Again, about a month and a half before, difficulty arose about some work and Price became angry when claimant told the boss about it. Admittedly Price is quick tempered and claimant knew this. However, both testified these difficulties had left no hard feelings between them.

The incident out of which claimant received his injuries occurred about 3:30 p. m. on May 9, 1950, in the eviscerating room in the sweet pickle department of appellee's plant. At that time claimant was operating an unloaded electric-lift tractor. He was proceeding south down a 6 to 6½-foot aisle located in this eviscerating room, which aisle was bordered on both sides by leacher vats. The tractor part of this electric-lift tractor is about 6 feet long and 3 feet wide. It has a 4½-foot fork lift attached to the front end. The operator rides on the front end of the tractor. At that time Price, while performing his duties as an employee, was walking south in this aisle. He was walking on the left-hand or east side. As claimant approached Price with the electric-lift tractor he honked the horn but Price kept right on walking. As the electric-lift tractor passed

Price the fork hit Price's right boot just below the ankle. Price thereupon became angered and struck claimant with his fist, hitting his left shoulder. Claimant then proceeded to use the tractor in an endeavor to pin Price against the leacher vats. However, the vats were about 18 inches apart and Price managed to get into one of these openings. There was a meat paddle lying on top of one of the vats Price was between so he reached up and got it. He then used it to strike at claimant. Claimant raised his left arm to ward off the blow. The paddle hit his left arm and resulted in the injury on which this claim is based, which is a compound comminuted fracture of the ulna of the left forearm.

"* * * an assault is an 'accident' within the meaning of the Workmen's Compensation Act 'when from the point of view of the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another.' Schneider's Workmen's Compensation Text (Perm. Ed.), section 1560; Brown v. Aluminum Co., 224 N. C. 766, 32 S. E. 2d 320; Conrad v. Foundry Co., supra." Withers v. Black, *supra.*

"Work-assaults should not be confused with injuries resulting from purely personal quarrels. An assault necessarily involves emotional make-up and disturbance and in a broad sense could be regarded as personal. But work causes quarrels and fights, and though interwoven with emotional disturbance, work-induced assaults are not a departure from the work. It is sufficient that the work brings the claimant within the range of peril. Personal animosities, created by 'working together on the assembly line, or in traffic,' accumulate and explode; and if attributable in substantial part to the working environment, the resulting injuries arise out of the employment." 4 NACCA Law Journal 53.

"Where the nature of the employment is such as to expose a worker to a wrongful act by another worker, which may reasonably be said to have been induced by

the peculiar conditions of the employment, the manner in which it was carried on, and the appliances required, such an act may reasonably be said to 'arise out of the employment.'" Socha v. Cudahy Packing Co., 105 Neb. 691, 181 N. W. 706, 13 A. L. R. 513. See, also, Miller v. Reisch Co., 132 Neb. 338, 271 N. W. 853.

"Arguments, altercations and assaults are as inevitable as they are undesirable. Where they arise out of the employment, they may be properly regarded as an employment hazard." Newell v. Moreau, on rehearing, 94 N. H. 443, 55 A. 2d 476.

This is well stated in Pekin Cooperage Co. v. Industrial Commission, 285 Ill. 31, 120 N. E. 530, as follows: "All concur in the rule that the accident, to be within the Compensation act, must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of the employment has been established. Where men are working together at the same work disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's work in which two men are engaged and as a result of it one injures the other, it may be inferred that the injury arose out of the employment."

While there seem to be some cases which hold contrary to this view, we think the following from 58 Am. Jur., Workmen's Compensation, § 266, p. 767, fairly summarizes the holdings in general: "While there is some lack of harmony among the decisions, it may be stated that in most instances an injury to an employee as a result of an assault by a coemployee, committed in the course of the employment and growing out of some incident or condition thereof, and not done solely for the gratification of personal ill will, is held to be compensable as arising out of the employment." A careful study

of the cases indicates that what lack of harmony there is flows more from determining what principles are applicable, in view of the facts involved, than it does to any difference in the principles themselves.

The facts in the present case, under the principles hereinbefore set forth, establish that the altercation between claimant and Price arose out of the working conditions of their employment and therefore we find claimant's injuries were caused by an accident arising out of and in the course of his employment with appellee. See, Miller v. Reisch Co., *supra;* Newell v. Moreau, *supra;* Withers v. Black, *supra;* Scholl v. Industrial Comm., *supra;* Pekin Cooperage Co. v. Industrial Comm., *supra;* Globe Indemnity Co. v. Industrial Accident Comm., 2 Cal. 2d 8, 37 P. 2d 1039; Schultz v. Chevrolet Motor Co., 256 Mich. 393, 239 N. W. 894; Keithley v. Stone & Webster Engineering Corp., 226 Mo. App. 1122, 49 S. W. 2d 296; Travelers' Ins. Co. v. Culpepper (Tex. Civ. App.), 82 S. W. 2d 1054; Hartford Accident & Indemnity Co. v. Cardillo, 112 F. 2d 11.

As stated in Keithley v. Stone & Webster Engineering Corp., *supra:* "* * * the rule generally applied is that where a controversy leading to an assault is connected with or pertains to the employment or is incidental to the work of the employee, the resulting injury arises out of the employment."

Of course, if this was solely a personal quarrel, which we find it was not, a different rule would apply for, as stated in 58 Am. Jur., Workmen's Compensation, § 266, p. 768: "* * * it is generally held that an injury from an assault on an employee committed by one solely to gratify his personal ill will, anger, or hatred does not arise out of the employment within the meaning of the workmen's compensation acts, * * *."

"Practically all authority holds that an assault by one employee upon another for personal reasons, not growing out of the relation as fellow employees, or out of acts in the performance of their work, cannot be held to

arise out of the employment." Schultz v. Chevrolet Motor Co., *supra.*

"We understand it to be the rule that where an employee, for reasons personal to himself and not in furtherance of any duty owed his master, invites a personal encounter and willingly engages in it and is injured as a result thereof, he cannot recover. In such case it is apparent that the injury does not arise out of the employment but has its origin in matters lying wholly outside of the duties owed by the employee to the master." Travelers' Ins. Co. v. Culpepper, *supra.* See, also, Armour & Co. v. Industrial Comm., 397 Ill. 433, 74 N. E. 2d 704; Urak v. Morris & Co., 107 Neb. 411, 186 N. W. 345.

Appellee contends that at the time claimant was injured he was using the tractor for his own purpose and therefore not acting in the course of his employment.

It is true that when an employee actually deviates from his employment and is injured while engaged in his own business or enjoyment the injury is not compensable because it does not arise out of and in the course of his employment. See, Sheets v. Glenwood Telephone Co., 135 Neb. 56, 280 N. W. 238; Simon v. Standard Oil Co., *supra.*

As stated in Simon v. Standard Oil Co., *supra:* "An injury is not compensable where an employee on his own initiative leaves the line of duty under his employment for a purpose of his own and pursues it to his injury."

This principle is not here applicable as claimant did not leave his line of duty under his employment for purposes of his own but engaged in an altercation arising out of an incident in connection with the working conditions of his employment. On principle almost all cases hold if he is injured as a consequence thereof such injury is compensable as arising out of and in the course of his employment. See authorities already cited.

Appellee further cites cases involving altercations where the original altercation had ceased and thereafter

claimant, on his own initiative, renewed it to his injury. Also cases are cited where the employee left his place of duty to go elsewhere on the property to engage a fellow employee in an altercation. In such cases courts have, for various reasons, denied recovery. Some hold it is a deviation from the line of duty. While we think these cases correctly denied compensation they have no application here where the altercation, arising out of an incident connected with the working conditions of these employees, was continuous. See, Vollmer v. Industrial Comm., 254 Wis. 162, 35 N. W. 2d 304; Feda v. Cudahy Packing Co., 102 Neb. 110, 166 N. W. 190; Gray's Case, 123 Me. 86, 121 A. 556; Griffin v. A. Roberson & Son, 162 N. Y. S. 313.

Suggestion is also made that claimant was the aggressor. We do not so find. But even if such were true it would not necessarily defeat recovery. As stated in 58 Am. Jur., Workmen's Compensation, § 266, p. 768: "The fact that the assault was provoked by the employee, or that he was the aggressor in the affray, does not necessarily render the injury noncompensable, although it may do so where such provocation or aggression amounted to wilful misconduct."

As stated in 4 NACCA Law Journal 53: "Where the assault is directly connected with the work, and arises out of work-quarrels, as distinguished from personal quarrels, the assault is compensable without determining questions of aggressors or innocent parties. Courts are not justified in making exceptions for 'aggressors' where the legislature has not done so by express provisions. An assault that arises out of work-arguments as distinguished from personal grudges, is clearly causally related to the employment, regardless of who strikes the first blow, and hence 'arises out of' the employment. Furthermore, to make a distinction between aggressors and innocent victims adds further complications as to what constitutes an aggressor, and is judicial legislation in a remedial act intended to widen, not narrow, the

rights of workers. In tort law, who strikes the first blow may be material on assumption of risk, contributory negligence, intervening cause, and on other questions. But in compensation law, the question of 'arising out of' depends simply on the causal relation to the work, in which the question of 'aggressors' is a court made, not legislative, exception."

These principles find support in the following cases where they are fully discussed. Hartford Accident & Indemnity Co. v. Cardillo, *supra;* Dillon's Case, 324 Mass. 102, 85 N. E. 2d 69; Travelers' Insurance Co. v. Culpepper, *supra.*

This brings us to the question of whether claimant was willfully negligent at the time of receiving his injuries within the meaning of section 48-127, R. S. 1943, so as to defeat his right to recover compensation. The burden of establishing willful negligence on the part of claimant is on appellee. Section 48-110, R. S. 1943. The act defines "willful negligence" as "such conduct as evidences reckless indifference to safety." Section 48-151, R. S. Supp., 1949.

We do not find claimant's conduct to be of this character.

Having come to the conclusion that the claimant is entitled to recover, the question arises as to the amount of compensation he is entitled to receive. He was temporarily totally disabled from May 9, 1950, until July 20, 1950. Thereafter he made complete recovery. At the time of the injury he was earning $69 per week. He had, as a result of his injuries, hospital bills in the total of $71.80 and doctor bills totalling $87. Claimant is therefore entitled to recover compensation for total temporary disability from May 9, 1950, to July 20, 1950, at the rate of $22 per week (see section 48-121, R. S. Supp., 1949) and for medical and hospital services the sum of $158.80.

The action of the district court is therefore reversed and the cause remanded with directions that it enter a

decree in accordance herewith, all costs to be taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

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CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, APPELLANT, V. WINTERS CREEK CANAL COMPANY, A CORPORATION, ET AL., APPELLEES.
53 N. W. 2d 543

May 16, 1952. No. 33154.

1. **Municipal Corporations.** The exercise of police power delegated to a municipal corporation cannot be invoked by it on purely aesthetic grounds.
2. ———. In the exercise of police power delegated to a city it is generally for the municipal authorities to determine what ordinances are required for the health, safety, and welfare of the people, but their action is not final and is subject to scrutiny of courts.
3. ———. The test in such cases is whether the ordinance in question is a bona fide exercise of police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation.
4. ———. A legal presumption exists in favor of validity, and unless the contrary appears upon the face of an ordinance the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that the regulation imposed is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law.
5. ———. A municipal ordinance enacted in the exercise of police power is not necessarily invalid because it infringes on private rights or property, but such infringement should not be arbitrary, unreasonable, or confiscatory.
6. ———. In passing upon the reasonableness of municipal ordinances, courts may consider the character of the regulation, the object to be accomplished, the means for its accomplishment, and all the relevant facts and circumstances of each particular case.
7. ———. The exercise of police power by municipal corporations must be directed toward and have a rational relation to protection of a basic interest of society rather than the mere advantage of particular individuals, and must be reasonable and free from arbitrariness.

8. **Municipal Corporations: Nuisances.** An ordinance which declares to be a nuisance that which is not but which may become such under certain circumstances should be directed against the circumstances which are harmful, and not against a particular type of property which, in itself and aside from the harmful circumstances, is not harmful.
9. ———: ———. The general power of a city to declare, prevent, or abate nuisances does not include the power to declare anything a nuisance which is not one in fact or per se.
10. **Waters: Nuisances.** Where an irrigation canal or ditch has been authoritatively constructed and operated in conformity with law, it is not a nuisance in fact or per se, and can only become one by reason of the manner in which it is maintained and operated; and the mere fact that a municipality subsequently includes the same within its city limits does not convert such canal or ditch into a nuisance.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, VIRGIL FALLOON, AND EDMUND P. NUSS, JUDGES. *Affirmed.*

*Jack Lyman,* and *Neighbors & Danielson,* for appellant.

*Mothersead, Wright & Simmons,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, a city of the first class, brought this action against defendants, Winters Creek Canal Company, a Nebraska irrigation corporation, and its directors, to obtain a mandatory injunction requiring them to comply with the provisions of a city ordinance. Concededly defendants had not complied therewith, and they defended upon the ground that the ordinance was arbitrary, unreasonable, and confiscatory. Thus as an attempted exercise of police power, it was alleged to be unconstitutional and unenforceable as to them. After a hearing upon the merits the trial court rendered a judgment dismissing plaintiff's action with prejudice, and decreeing that the ordinance was unconstitutional and null and void as applied to defendants' canal and laterals.

Plaintiff's motion for new trial was subsequently overruled and it appealed, assigning substantially that: (1) The judgment was not sustained by the evidence but was contrary thereto and contrary to law; and (2) the trial court erred in rejecting or refusing to take judicial notice of certain evidence offered by plaintiff. We conclude that the assignments should not be sustained.

The ordinance, passed and approved June 3, 1947, provided in substance that all open ditches and canals extending through any part of the city which are in excess of 3 feet in width at the natural surface of the ground and 12 inches deep below such surface, in which water 6 inches or more deep is permitted to flow during any period of any year, are dangerous to health, life, and property of inhabitants of the city and the public generally, and are public nuisances. It then provided that on or before November 1, 1947, the owner or owners of any such ditch or canal should abandon and fill it to the level of the natural surface, or in the alternative should construct a pipe or conduit therein "of sufficient size and capacity to carry or conduct into and through such pipe or conduit all of the water which may be permitted to flow through such ditch or canal; * * *." The top of such pipe or conduit was required to be placed not less than 12 inches below the natural surface of the adjacent ground and be covered with earth to the level thereof. Such owners were also required to construct in a good and substantial manner a screen at the head of such pipe or conduit and were permitted to construct necessary manholes which were required to be kept securely covered except as necessarily in use, when they must be guarded. All of such pipes, conduits, screens, and manholes were required to be maintained and kept in good order and repair by the owners at their expense. It was made unlawful for any such owners to fail or neglect to comply with any of such provisions, the daily violation of which was each made a misdemeanor punishable by fine and commitment to the city jail until such fine and

costs were paid, secured, or otherwise discharged according to law.

The pertinent facts are not in dispute. Winters Creek Canal Company is a Nebraska corporation organized and operated as a common carrier under the provisions of Chapter 46, article 2, R. S. 1943, for the purpose of furnishing and delivering water for irrigation at reasonable rates to be fixed by the Nebraska State Railway Commission. It was required to keep its works, canals, and laterals in reasonable and proper repair for the delivery and diversion of water to appropriators therefrom, under the control and direction of such commission. It is the owner of an appropriative right to the water of the North Platte River, with a priority date of October 18, 1888. Its canal, 12 miles in length, passes through certain described lands, and, according to its appropriation, "covers and reclaims" described lands "amounting in all to about 8700 acres."

As provided in the articles of incorporation, its capital stock is $100,000, divided into 1,000 shares of the par value of $100 each, to be paid for in cash or its equivalent. The highest amount of its indebtedness is thereby limited to two-thirds of such capital stock. Approximately two-thirds of such stock is owned by landowners under the canal, and one-third thereof by others.

The company's sources of revenue are an annual acre assessment against the land, plus water turn-out charges not based on acreage but on each turn-out, which sums, responsive to estimated expenses, are ordinarily fixed by the stockholders at their annual meeting. The 1951 assessment was $2.50 an acre, with a turn-out charge of $2.50. Some of the lands do not ordinarily require irrigation. Therefore, its average annual acreage irrigated under the canal was approximately 3,800 acres, of which a small portion, 386 acres, lies west of the city's corporate limits. Some of the land is undesirable, some of it is just fair in quality, and the best is now valued at perhaps $200 an acre.

Construction of the company's canal was authoritatively begun in November 1888, and by the next year 10 miles of it had been completed. In 1890 it was enlarged and extended to its present length. The city of Scottsbluff was organized in 1900, at which time all land north and south of the canal was agricultural. No part of the canal or its laterals was enveloped within the corporate limits of the growing city until in 1920, some 30 years after it had been constructed. In 1946, some 56 years after construction of the canal, and again in 1950, since the commencement of this action, other tracts through which the canal and its laterals were constructed became a part of the city. The record also discloses that if the growth of the city continues as it has in the past, additional portions of the canal and its laterals will eventually be included within the corporate limits.

A concededly competent civil engineer, who had been personally and professionally cognizant of the canal and its laterals for many years, made a recent survey and plat of that portion of the canal and laterals within and adjacent to the city. They are all a foot or more deep and three feet or more in width at the top, and carry in excess of six inches of water during some period of each year. Such engineer estimated and it is not disputed that the then cost of compliance with the ordinance would be $138,632.46 if a 72-inch pipe of "sufficient size to carry all water which may be permitted to flow through" such canal and laterals was installed, with smaller ones in the laterals, and that subsequent maintenance costs would also be increased. The installation of an inadequate 60-inch pipe in the main canal would reduce the cost to $117,197.06. The cost under the first figure of $138,632.46 would be $36.48 an acre upon the basis of 3,800 acres, the average annually irrigated, or $21.60 an acre upon the basis of 6,400 acres which could be irrigated. The cost under the second figure of $117,197.06, upon the basis of a 60-inch pipe

claimed by plaintiff to be adequate for 3,800 acres, would be $30.82 an acre. All such computations, however, clearly overlook the fact that as the city grows in the future and envelops the canal and laterals, the cost would mount proportionately for future compliance.

Officers of the company testified, and it is undisputed, that the company has never paid a dividend, has no surplus or property except its irrigation works plus $794.21 cash on hand, and that there was no possible way for the company to finance such a project and comply with the ordinance. The ultimate result would thus be abandonment of the irrigation project as provided in the ordinance, and confiscation of the company's property without due process or payment of just compensation therefor.

Six witnesses who lived near the canal testified for the city in an attempt to establish that the canal was dangerous for children. One such witness was a renter of property near the canal. The others had built or purchased their homes there, well knowing about the canal. They did so because proximity of the canal made their lots or properties cheaper. Naturally the city and such witnesses as well wanted the ordinance complied with because it would not only beautify the city but also enhance the value of their property. In that connection, however, the exercise of police power delegated to a municipal corporation cannot be invoked by it on purely aesthetic grounds. Baker v. Somerville, 138 Neb. 466, 293 N. W. 326; Standard Oil Co. v. City of Kearney, 106 Neb. 558, 184 N. W. 109, 18 A. L. R. 95; 37 Am. Jur., Municipal Corporations, § 289, p. 930.

Each of such witnesses detailed an incident whereat a child fell into or was found in the canal and either got out himself or was removed therefrom by others. Three such witnesses and another who was a witness for defendants, testified that culverts built by plaintiff city in the canal were too small and too high above the bottom of the canal to carry the water. Thus it was

forced back up therein, making the water deeper.

It appears that but one such incident surely happened before the ordinance was passed. That incident happened seven years previously. Therefore, none of such incidents could have been any inducement to passage of the ordinance. It also appears that but one person testified concerning any incident relating to his or her own children, and that no child ever lost its life or was seriously injured.

Generally, irrigation water runs in the canal and laterals from May to October. However, at various other times there has been some water therein. Photographs taken in December 1949 and April 1950 and 1951 respectively appear in the record, showing some grass and weeds in and along the sides of the canal or laterals, with a small amount of standing or slowly moving debris-laden water lying therein.

It will be noted, however, that this is not an action to abate any such alleged nuisance resulting from the manner or method of operating the canal, but rather is one to require defendants to abandon its property or reconstruct it in a particular manner, because as originally and lawfully constructed it is of itself an alleged legislative nuisance in which the court is called upon to scrutinize validity of an attempted legislative exercise of police power.

Another photograph taken in May 1950, evidently after a rain, shows mud in the alley, disconnected water in the street, and running water in the canal a foot or less from the top. The water in the canal and laterals does not flow with rapidity or in great volume, and could not possibly be a danger to any person except very small, unattended children, whose parents established homes nearby, well knowing the situation.

In Standard Oil Co. v. City of Kearney, *supra*, this court held: "In the exercise of police power delegated to a city, it is generally for the municipal authorities to determine what rules, regulations and ordinances

are required for the health, comfort and safety of the people, but their action is not final and is subject to the scrutiny of the courts."

As stated in Union Pacific R. R. Co. v. State, 88 Neb. 247, 129 N. W. 290, quoting from In re Anderson, 69 Neb. 686, 96 N. W. 149: " 'The test in such cases is whether the regulation in question is a bona fide exercise of the police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation.' "

A legal presumption exists in favor of validity, and unless the contrary appears upon the face of the ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that the regulation imposed by it is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law. State ex rel. Andruss v. Mayor, 120 Neb. 413, 233 N. W. 4; Council Bluffs Transit Co. v. City of Omaha, 154 Neb. 717, 49 N. W. 2d 453.

In 62 C. J. S., Municipal Corporations, § 204, p. 381, it is said: "In passing on the reasonableness of municipal ordinances and regulations, the courts may consider the object to be accomplished, the means for its accomplishment, and all the surrounding facts and circumstances."

In Enterprise Irrigation Dist. v. Willis, 135 Neb. 827, 284 N. W. 326, this court said, citing numerous authorities: "That an appropriator of public water, who has complied with existing statutory requirements, obtains a vested property right has been announced by this court on many occasions." In the opinion this court quoted with approval from Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607, as follows: " 'It may be conceded that the phrase "police power of the state" has, as to its scope and meaning been subjected to a quite severe strain of recent years in the endeavor to so expand it as to cover all sorts of legislation sought to be enacted in the asserted interest of modern progress;

but we have yet to be referred to a case wherein it has been judicially so far expanded as to invest the legislative department of this state with arbitrary power to destroy vested rights in private property when such rights are being exercised and such property is being employed in the useful and in nowise harmful production of wealth, and when such use and the product thereof cannot be said or shown to be inimical to public health or morals or to the general welfare; but, on the contrary, must be conceded to be beneficial to each and all of these.' "

As stated in 62 C. J. S., Municipal Corporations, § 146, p. 301: "Municipal powers and regulations, including police powers, are subject to the limitations of both the federal and state constitutions. In general, whatever the state itself is prohibited from doing is equally prohibited to its municipal corporations." As stated in 62 C. J. S., Municipal Corporations, § 149, p. 306: "A municipal regulation, particularly one enacted in the exercise of the police power, is not necessarily invalid because it infringes on private rights; but such infringement should not be arbitrary or unreasonable."

In Webber v. City of Scottsbluff, 141 Neb. 363, 3 N. W. 2d 635, this court said: "In this connection we are not unmindful of the rule already stated that municipal corporations are prima facie the judges respecting the necessity and reasonableness of their regulatory ordinances, but this rule cannot be carried to the extreme of requiring us to hold on the face of the ordinance that restrictions upon a lawful business having no inherent, generally recognized, or legislatively declared vices are regulations proper under the police power."

Also, as held in Jewel Tea Co. v. City of Geneva, 137 Neb. 768, 291 N. W. 664: " 'The exercise of the police power by a municipal corporation must be directed towards and have a rational relation to protection of a basic interest of society rather than the mere advantage of particular individuals and must be reasonable and

free from arbitrariness.' N. J. Good Humor, Inc., v. Board of Commissioners, 11 Atl. (2d) 113."

In State ex rel. Westminster Presbyterian Church v. Edgecomb, 108 Neb. 859, 189 N. W. 617, 27 A. L. R. 437, this court quoted with approval from Chicago, B. & Q. R. R. Co. v. Drainage Commissioners, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596, as follows: " 'And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare.' "

In Chicago, B. & Q. R. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 53 Am. S. R. 557, 41 L. R. A. 481, this court said: "It will not, of course, be contended that the power of the legislature is, in that respect, absolute, or that it may at will impose upon property burdens so unreasonable as to work a practical confiscation. There is, as all admit, a limit beyond which it cannot go and within which it will be confined by the judicial power of the state."

In Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321, the court said: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain

magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power. * * * The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree —and therefore cannot be disposed of by general propositions."

In Commonwealth v. Reed, 34 Pa. 275, 75 Am. Dec. 661, it is said: "It would, indeed, be strange, that any legal proceeding could be instituted in a county through which a great public work passes, by which the whole purposes of the improvement might be destroyed, upon the singular allegation, that what has been constructed under the express authority of the legislature, is a great public nuisance."

In 37 Am. Jur., Municipal Corporations, § 286, p. 923, it is said: "In the same way, property rights may not be arbitrarily interfered with or destroyed, or property taken without compensation, under the guise of municipal police regulations. An ordinance which permanently so restricts the use of property that it cannot be employed for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of property." As stated in 37 Am. Jur., Municipal Corporations, § 292, p. 935: "An ordinance which declares to be a nuisance that which is not a nuisance, but which may become such under certain circumstances, should be directed against circumstances which are harmful, and not against a particular type of property which, in itself

and aside from the harmful circumstances, is not harmful. A distinction must be taken between a structure itself and the use to which it has been put." See, also, 37 Am. Jur., Municipal Corporations, § 293, p. 935, citing authorities from almost every jurisdiction.

Plaintiff, in support of its contentions, relied primarily upon Platte & Denver C. & M. Co. v. Dowell, 17 Colo. 376, 30 P. 68, decided in 1892. On the other hand, defendants relied primarily upon City of Twin Falls v. Harlan, 27 Idaho 769, 151 P. 1191, decided in 1915 and subsequently affirmed in Hendrix v. City of Twin Falls, 54 Idaho 130, 29 P. 2d 352, decided in 1934, and again cited with approval in State v. Finney, 65 Idaho 630, 150 P. 2d 130, decided in 1944.

In that connection, the afore-cited case relied upon by plaintiff is clearly distinguishable from that at bar not only upon the facts but also upon the issues presented for decision. It was an action to recover damages for the death of a boy by drowning because defendant was allegedly guilty of negligence per se in failing to comply with a state statute containing provisions comparable in some respects with the ordinance at bar, which statute applied to all cities of the first class or their equivalent, and preserved the right of recovery in such cases. Defendant, appellant therein, a milling corporation, owned and operated a large uncovered and unprotected canal for milling purposes, as distiguished from irrigation, which conveyed a large volume of water a distance of several miles through a thickly populated district of Denver. The incline was such that the large volume of water necessarily flowed with great rapidity; as the court said, "a constant menace to life and property" which the corporation "has no constitutional right to perpetuate * * *." It was concluded that the statute was not the imposition of an unreasonable precaution, and under the particular circumstances appearing did not unlawfully deprive appellant of its property or the

enjoyment thereof. We do not have such a situation presented here.

On the other hand, the afore-cited case relied upon by defendants is directly in point, and, we conclude, of controlling force in the case at bar. Here in fact we have a stronger case in defendants' favor, because compliance with the unreasonable ordinance would also be confiscatory and take from or deprive defendants of their property without due process of law or payment of just compensation therefor, and in the future would continue to do so as the city, benefiting therefrom, grew and enveloped defendants' property.

Briefly, in that cited case the facts were that during the months of September and October 1904, the irrigation canal involved was authoritatively constructed. The lands through which it was constructed were then unclaimed sagebrush territory. In December 1904 such lands were platted as town lots. Following its construction the land became settled, and in 1905 first a village government and later the city government of Twin Falls was established, which subsequently passed an ordinance comparable in material respects with that here involved. Concededly it was not complied with and the manager of the irrigation company was convicted and fined for failure to comply. He appealed and, as stated in the opinion, under facts comparable with those here involved: "No unusual conditions exist. Nothing is harmful or dangerous aside from the fact that the people live near it and may fall into it. * * * The general power of a city to declare, prevent and abate a nuisance does not include the power to declare anything a nuisance which is not one in fact nor one per se."

Significantly, the court also said: "A ditch or canal that was constructed prior to the time that a town or city was located along it occupies substantially the same position with reference to the city and its inhabitants as would a natural stream. If the water of a natural stream is used for the irrigation of lands along its course,

it would not be just or right to compel such users to cover the stream where it ran through a village or city; it would develop upon the municipality to place such barriers along such stream as would be necessary to protect its people. A canal company is under the obligation to keep its canal in proper repair and proper condition to furnish the water users with water, and if this is properly done, the municipality would have no more right to complain than it would if it were a natural stream. The users of water from a natural stream would have the right to have the water of such stream, if they had appropriated it prior to the time that the village or city was laid out or established upon its borders, kept within its banks in order to give them the full benefit of their prior appropriations. The rule of law applicable to such a case would be the same whether the channel through which the water was conducted was artificial or natural." In the situation presented here we conclude, as the court did in that case, "such ordinance held invalid when applied to the ditch in question." Whether or not it would be valid in other incomparable situations we do not discuss or decide.

Counsel for plaintiff asked certain witnesses whether or not they had seen dead animals in the canal near their home. Thereto defendants objected substantially upon the ground that no time had been fixed, no foundation laid, and that the evidence was incompetent, irrelevant, immaterial, and not within the issues of the case, the question presented being whether or not the ditch itself is a nuisance as defined by the ordinance, and not whether or not it was operated as a nuisance. The objections were sustained, whereupon plaintiff offered to prove that the witnesses had observed dead animals in the canal and that the odor therefrom was offensive. Like objections were made to the offer and were severally sustained. Plaintiff, without citing any authority except section 28-1014, R. R. S. 1943, argued that the trial court erred in so ruling. We conclude otherwise.

In that connection it will be noted at the outset that no foundation was laid, and that the offer was broader than the question. Also, as stated by plaintiff in its brief: "It is significant that the court is called upon to scrutinize the exercise of legislative power, and that judicial abatement of an alleged nuisance is not sought. * * * If Scottsbluff sought the judicial abatement of an alleged nuisance, the scope of judicial inquiry would be infinitely greater." Such statements answer plaintiff's contention. We are not here considering an ordinance which provided that any irrigation canal in which dead animals or other debris is permitted to accumulate shall be a nuisance.

In Standard Oil Co. v. City of Kearney, *supra,* this court said: "It is also claimed that the noise of the honking of horns and the running of the engines would be a nuisance to the other users of the street. The noise, however, is only incidental to and not a necessary part of the proposed business. If the protection of the public from noise was the purpose sought to be attained, it would seem that it could be easily controlled by proper ordinances going directly to that subject." See, also, City of Omaha v. Hugh Murphy Construction Co., 114 Neb. 573, 208 N. W. 667; Stuhr v. City of Grand Island, 120 Neb. 491, 233 N. W. 886. Likewise, if protection of the public from dead animals or debris in the canal and laterals is a purpose sought to be obtained, the city of Scottsbluff has a like remedy, or, under proper circumstances, it may turn for relief to section 28-1014, R. R. S. 1943.

Plaintiff offered to prove by the introduction of parts of official hydrographic reports of the Department of Roads and Irrigation that defendants over a period of years had satisfied a part of their water requirements by diversions from a drainage ditch which intersects the canal after it has passed through the city. They made such offer purportedly in order to show that the water carriage capacity of defendants' canal and laterals within

the city equal to its maximum permitted appropriation or diversion was not required, thus reducing its burden of compliance with the ordinance. The trial court sustained objections thereto, and plaintiff contended that it erred in so doing, or that in any event judicial notice should have been taken of the facts disclosed thereby.

We conclude that plaintiff's contention in that regard has no merit because the facts disclosed by such evidence could not in any manner affect ultimate decision in this case. In that connection the very ordinance which plaintiff is attempting to enforce provides that such pipe or conduits should be "of sufficient size and capacity to carry or conduct into and through such pipe or conduit all of the water which may be permitted to flow through such ditch or canal."

The important point, however, is that Winters Creek Canal Company has no appropriation to divert waters from Winters Creek drainage ditch. Its appropriation is from the North Platte River. It is true that for a number of years state officials have, as a matter of grace, tolerated the taking of some water by defendant company from such drain, but concededly it has no appropriation therefrom. Whether or not it could obtain such an appropriation we are not required to discuss or decide. It is sufficient for us to cite Drainage District No. 1 v. Suburban Irrigation Dist., 139 Neb. 460, 298 N. W. 131. On the other hand, even if such waters were subject to appropriation, defendant company could not be required by plaintiff to surrender its 1888 appropriation for a different appropriation. Contrary to plaintiff's contention, the opinion in Nebraska v. Wyoming, 325 U. S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815, is not controlling because it did not and obviously could not change the Constitution and statutes of this state. It simply made an "equitable apportionment between the States of the water of the North Platte River." We therefore conclude that the trial court did not err in refusing to admit or take judicial notice of such official reports.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

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HERMAN F. NACKE ET AL., APPELLEES, V. THE CITY OF HEBRON, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
53 N. W. 2d 564

Filed May 16, 1952. No. 33170.

1. **Municipal Corporations.** Under the provisions of section 70-503, R. R. S. 1943, and 18-412, R. S. 1943, without an authorizing election, a city may not issue revenue bonds to secure funds to pay for the construction of a complete electric light and power plant when it does not own such a plant and has not for many years owned or operated such a plant, but does own transmission lines and a distribution system.
2. **Statutes.** In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will.
3. **Muncipal Corporations: Injunctions.** When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction. Where the law requires that the question shall be submitted to popular vote, an issue of bonds without such a vote will be enjoined.

APPEAL from the district court for Thayer County: STANLEY BARTOS, JUDGE. *Affirmed.*

*Johnston, Thompson, Raymond & Mayer, Perry & Perry, Albert Pike II,* and *H. W. Hess,* for appellants.

*W. O. Baldwin,* for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action to enjoin the defendants from entering into a contract for the construction of an electric power plant and from issuing revenue bonds of the city to secure funds to pay for said power plant. Issues were made and trial was had resulting in a decree enjoining the defendants as prayed. The defendants, hereinafter called the city, appeal. We affirm the judgment of the trial court.

We recite the facts appearing in the record, so far as necessary to a determination of the question presented here.

Prior to 1910, a private company generated and sold electricity to the city and its inhabitants. During that year an election was held which authorized the city to issue bonds for the purpose of "establishing and maintaining a system of Electric Lights." As a result of that election the city purchased and thereafter operated the plant theretofore in the city which consisted of a generating plant, transmission lines, and distribution system. That condition continued until 1921.

Beginning in 1921, as a result of a favorable election on the question of purchasing electric power, the city purchased its electric current from a third party or parties under a 10-year contract. That method of securing electric current continued uninterrupted to the time of the trial in this action. The contract for the purchase of power contained a provision whereby the city leased its generating plant to the supplier of current to be used as an auxiliary plant. Whether or not the city's plant was thereafter operated is not shown.

In 1928 or 1929, "boys" broke into the plant and removed brass and copper parts from the machinery. Thereafter it was not in an operating condition and, although it could have been repaired, that was not done.

In the early 1930's, the city sold the machinery and boilers, excepting the switchboard, and they were re-

moved from the building. Thereafter the city leased the building for various purposes.

In 1946, the city sold the building and ground on which it was located and delivered possession to the purchaser. The city, by brief here and without more, assures us that that sale was void. It does not appear that the sale has been otherwise challenged. The city here challenges the legality of its own act in order to aid in the defeat of this action. We need consider that contention no further than to point out that the city at the opening of the trial stipulated that it did not then own a generating plant, contending only that it had transmission lines and a distribution system.

It thus appears that from 1921 to the time of trial in 1951, the city has not generated electricity; from 1928 or 1929 to the time of trial it has had no operable generating plant; from sometime in 1930, it has had no machinery for the production of power; and from 1946 on, it has not owned the building formerly used for that purpose.

In 1950, the city council took steps looking to the construction and operation of a power plant. It employed an engineer, had plans and specifications prepared, published notice to bidders, and received bids. Preliminary steps were being taken to issue and sell revenue bonds to secure funds to pay for the same when this action was commenced. An authorizing election was not had.

It is the city's contention that as a result of the 1910 election it was given the power to acquire and operate an electric light and power plant, and that that is a continuing power.

The record here does not show the particular statutes under which the 1910 proceedings were authorized. The Legislature in 1889 passed an act to authorize a city of the second class "to establish and maintain, a system of electric lights." Laws 1889, c. 19, p. 350. That act with amendments is found in Annotated Statutes 1909, sections 8994 to 8997. Because of the particular

language of the statute and the use of that same language in the proceedings in 1910, we assume that the proceedings were under that act. Possibly for the reasons suggested by State v. Searle, 76 Neb. 272, 107 N. W. 588, these sections were omitted from the 1913 revision. See Rev. St. 1913, p. 2515.

In Carr v. Fenstermacher, 119 Neb. 172, 228 N. W. 114, the city was proceeding to buy a Diesel engine and other equipment for the improvement of an electric light and power plant that it was then operating, the new equipment being needed to make the plant efficient. The statute there construed and applied was section 4396, Comp. St. 1922. It authorized the city "to purchase, construct, maintain and improve heating lighting systems." This act stems back to chapter 22, Laws 1901, page 326, which authorized cities of the first and second class "to establish and maintain a heating or lighting system." As it now is, with amendments, see sections 19-1401 to 19-1405, R. S. 1943. Sections 18-101 to 18-105, Comp. St. 1929, are discussed in Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649.

Granting the original power, as a result of the 1910 election, nevertheless the city does not attempt to bring its acts here within either the statutes involved in the 1910 election or in the Carr case. It now claims the authority for its acts under the provisions of sections 70-503, R. R. S. 1943, and 18-412, R. S. 1943, as construed by our decisions.

It is a matter of common knowledge that the electric industry was in its infancy in this state at the time the act on which the city based its 1910 election was passed, and likewise when the original act construed and applied in the Carr case was passed. Generally at that time electric plants, by whatever name they were described, consisted of one unit under one ownership and were operated independently of other plants. The one unit had as its three component parts a generating

system, some transmission lines, and a distribution system. There was no particular occasion to distinguish between the three component parts in legislation at that time. The Carr case must be read in the light of those facts and the statute there construed.

However, by 1930, that situation had changed. The industry had developed, as had the uses of electricity. Electrical energy was being produced in large central plants and distributed by far-flung networks of transmission lines, so that one plant served many communities through local distribution systems. In some instances all three component parts were owned and operated by one party; in other instances power was sold at the plant and delivered to transmission lines; and in still other instances, power was produced, transmitted, and sold to independent distributing parties. In short, what had been one industry became in some instances two, and in others three, industries—each often independent in ownership and operation of the other.

At the November election in 1930, the people of this state enacted Initiated Law No. 324 (now, as amended, sections 70-501 to 70-515, R. R. S. 1943). There they legislated not as to electric light and power systems but throughout the act referred to electric light and power plants—distribution systems—transmission lines. Throughout the act it is recognized that while the component parts might be integrated, yet they were separable and could be and were treated as independent units. Section 3 of the Initiated Law, as amended, now appears as section 70-503, R. R. S. 1943. This section is as follows: "In lieu of the issuance of bonds or the levy of taxes as otherwise by law provided, and in lieu of any other lawful methods or means of providing for the payment of indebtedness, any city, village, or public electric light and power district within this state shall have the power and authority, by and through its governing body or board of directors, to provide for or to secure the payment of the cost or expenses of purchasing, con-

structing, or otherwise acquiring, extending and improving any real or personal property necessary or useful in its operation of any electric light and power plant, distribution system or (and/or) transmission lines, by pledging, assigning, or otherwise hypothecating, the net earnings or profits of such electric light and power district, city or village, derived, or to be derived, from the operation of such electric light and power plant, distribution system or (and/or) transmission lines, and to that end, to enter into such contracts and to issue such warrants or debentures as may be proper to carry out the provisions of this section." The act originally provided "and/or" where shown in parentheses. The 1943 revision changed the act to the language above quoted.

In Interstate Power Co. v. City of Ainsworth, *supra,* the city had neither power plant, transmission lines, nor distribution system. We there held that neither express nor implied power was conferred by Initiated Law No. 324 "to acquire an electric light and power plant and pay for it by pledge of future earnings." Language used in that opinion must be read in the light of facts which obviously did not call for a clear distinction to be drawn between the three units.

In Southern Nebraska Power Co. v. Village of Deshler, 130 Neb. 598, 265 N. W. 880, the village had a "complete plant and distribution system" in operation. There the proposal was for the purpose of enlarging the light plant and distribution system already constructed. There Initiated Law No. 324 was relied upon. It was held that the village had the power under the act. But there again, because of the factual situation, we were not called upon to distinguish between the several units.

The decision in Interstate Power Co. v. City of Ainsworth, *supra,* was filed October 20, 1933. The 1935 Legislature enacted chapter 38, section 1, Laws 1935, page 153. As amended, it now appears as section 18-412, R. S. 1943, and, so far as material here, is as follows: "Supplemental to any existing law on the subject, and

in lieu of the issuance of general obligation bonds, or the levy of taxes upon property, as by law provided, any city or village within the state of Nebraska may construct, purchase, or otherwise acquire, an electric light and power plant, distribution system, and (and/or) transmission lines, and real and personal property needed or useful in connection therewith, and pay the cost thereof by pledging and hypothecating the revenue and earnings of any electric light and power plant, distribution system, and (and/or) transmission lines, owned or to be owned by such city or village. In the exercise of the authority granted in this section, any such city or village may issue and sell revenue bonds or debentures and enter into such contracts in connection therewith as may be proper and necessary. Such revenue bonds or debentures shall be a lien only upon the revenues and earnings of the electric light and power plant, distribution system, and (and/or) transmission lines owned or to be owned by such city or village. No city or village shall pledge or hypothecate the revenue and earnings of any electric light and power plant, distribution system, or (and/or) transmission lines, nor issue revenue bonds or debentures, as authorized by this section, until the proposition relating thereto has been submitted in the usual manner to the qualified electors of such city or village at a general or special election and approved by a majority of the electors voting on the proposition submitted; * * *. The requirement herein of a vote of the electors, however, shall not apply when a city or village seeks to pledge or hypothecate such revenue and earnings, or issue revenue bonds or debentures, *solely* for the maintenance, extension or enlargement of any electric light and power plant, distribution system, or (and/or) transmission lines *owned by such city* or village." (Emphasis supplied.) The original act provided "and/or" where shown in parentheses. The 1943 revision changed the act to the language above quoted, and

made other minor changes in language not material and not set out here.

In Slepicka v. City of Wilber, 150 Neb. 376, 34 N. W. 2d 646, we construed and applied the same statutes that are here involved. There we were careful to point out that the city of Wilber retained at all times one of its generating units which "was kept for stand-by service only," and although it was old and inefficient, it was operable. It was "inadequate for the city's needs." We carefully pointed out that the city "temporarily" bought a part of and subsequently all its electrical energy. In the light of the fact situation there was no occasion to particularly distinguish between the specific units. There they were enlarging an existing power plant which the city then owned.

We did have occasion to point out in Drummond v. City of Columbus, 136 Neb. 87, 285 N. W. 109, on rehearing, 136 Neb. 99, 286 N. W. 779, that the powers granted and limited by the 1935 act related to not one system but to separate units, to wit, power plant, transmission lines, and distribution system. See, also, Munch v. Tusa, 140 Neb. 457, 300 N. W. 385; Inslee v. City of Bridgeport, 153 Neb. 559, 45 N. W. 2d 590.

These decisions do not directly determine the specific question here involved, which is, may a city issue revenue bonds without an authorizing election to pay for the construction of a complete electric power plant when it does not own, and has not owned or operated for many years, such a plant, but does own transmission lines and a distribution system.

As we said in City of Curtis v. Maywood Light Co., 137 Neb. 119, 288 N. W. 503, the intention of the Legislature is here to be obtained primarily from the language used in the enactment, which must be given effect according to its plain, obvious meaning.

" 'In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or super-

fluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will.'" In re Estate of Edwards, 138 Neb. 671, 294 N. W. 422.

We have recently restated the rule that "In construing a statute, effect must be given, if possible, to every word, clause, and sentence, so that no part of its provisions will be inoperative, superfluous, void, or insignificant." Safeway Cabs, Inc. v. Honer, *ante,* p. 418, 52 N. W. 2d 266.

The first sentence of section 70-501, R. R. S. 1943, relates to ownership or operation not of a light and power plant or system but to the three specific units repeatedly referred to in the act.

The first sentence of section 18-412, R. S. 1943, quoted above, provides that a city "may construct, purchase, or otherwise acquire * * *." Obviously such a proposition requires an authorizing election. The last sentence of section 18-412, R. S. 1943, quoted above, provides that the requirement of a vote shall not apply where the city proposes to pledge or hypothecate the revenues or earnings or issue revenue bonds "solely for the maintenance, extension or enlargement of any electric light and power plant * * * owned by such city* * *." Obviously what the city proposes to do here is to "construct" a power plant. It is not undertaking "solely" to maintain, extend, or enlarge that plant, nor does it "own" it. It does not exist.

The effect of these acts is to say, these things you may do to that which you own without a vote of the people, whether it be a light and power plant, or distribution system, or transmission lines, but as to what you do not own, you must have an authorizing vote.

To sustain the city's position would be to read out of the statutes the oft-repeated specific references to the three component units of an electric system. It would have us read the act as though the people in the initia-

tive act, and the Legislature in the 1935 act, used "electric light and power plant" as inclusive of distribution systems and transmission lines. It would have us render the repeated reference to distribution systems and transmission lines as surplusage. Obviously they were used for a purpose and must be given effect.

The city at one time owned a power plant, a transmission line, and a distribution system. Suppose it then dismantled and sold not only the power plant, as it did here, but also sold its distribution system—retaining ownership only of a transmission line. If the city's contention here is correct, then it could, on the foundation of having a transmission line, construct both a power plant and a distribution system, and issue revenue bonds to secure money to pay therefor without an authorizing vote of the people. We find nothing in this act, or in our legislative history, of any purpose to waive the requirement that the people shall first approve or disapprove such a course of action. The city's acts are not within the exceptions of the last sentence of section 18-412, R. S. 1943. The statute requires an election and approval of the proposal by the electors.

We conclude that the city does not have the power to do that which it here undertook to do. The rule is: "* * * 'When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction, * * *. Where the law requires that the question shall be submitted to popular vote, an issue of bonds without such a vote will be enjoined.'" May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

The judgment of the district court is affirmed.

AFFIRMED.

WINFRED SCARBOROUGH, APPELLEE, V. AEROSERVICE, INC., A CORPORATION, ET AL., APPELLANTS.
53 N. W. 2d 902

Filed June 6, 1952. No. 33130.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can be reasonably deduced from the facts in evidence.
2. **Carriers.** A private carrier is one that is not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a special contract, and such carrier is liable only for such loss or injury as results from a failure to exercise ordinary care.
3. **Negligence: Aerial Navigation.** In the absence of statute, the ordinary rules of negligence and due care obtain in respect to the maintenance and inspection of aircraft before flight by a private carrier when under agreement to carry a fare-paying passenger.
4. **Negligence.** Ordinary care is such care as the danger of the situation and the consequences that may follow an accident demand and may be a high degree of care under some circumstances and a slight degree of care under other circumstances.
5. ———. Inattention to the duty to exercise care in a situation which reasonably may be regarded as hazardous is negligence, notwithstanding the act or omission involved would not in all cases, or even ordinarily, be productive of injurious consequences.
6. ———. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.
7. **Trial.** Circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom.
8. **Negligence.** A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way, but is only required to satisfy the jury, by a preponderance of the evidence, that the injury occurred in the manner claimed.
9. **Evidence.** The declarations and admissions of a party to an

action against his own interest, upon a material matter, are admissible against him as original evidence.

10. **Trial: Appeal and Error.** The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear.

11. ———: ———. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

*Morsman, Maxwell, Fike & Sawtell,* for appellants.

*Wear & Boland, Davis & Pittman,* and *Robert D. Mullin,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is a law action brought by Winfred Scarborough as plaintiff against Aeroservice, Inc., a corporation, and Harold H. Honeywell, defendants, in the district court for Douglas County to recover damages for injuries sustained by the plaintiff when the airplane in which he was riding as a fare-paying passenger crashed. The airplane was owned by Aeroservice, Inc., and piloted by Harold H. Honeywell, an employee of Aeroservice, Inc.

It is apparent from the record that the trial court did not submit to the jury the question of negligence on the part of the defendant Harold H. Honeywell in the actual operation and handling of the plane in the air.

The cause was tried to a jury, resulting in a verdict in favor of the plaintiff and against both defendants, and determining the amount of damages to be awarded to the plaintiff. Judgment was entered on the verdict.

The defendants filed a motion for new trial and motion to have the verdict and judgment entered thereon set aside and to have judgment entered in accordance with the defendants' separate motions for directed verdict one of which was made at the conclusion of the plaintiff's evidence and the other at the conclusion of all of the evidence. The trial court overruled these motions. Defendants appealed.

For convenience we will refer to Winfred Scarborough as plaintiff, to the defendant Aeroservice, Inc., as Aeroservice, and to defendant Harold H. Honeywell as Honeywell or pilot.

The plaintiff's petition, insofar as need be considered here, in substance alleges the accident was proximately caused and brought about through the recklessness and negligence of the defendants Aeroservice and Honeywell in the following particulars to wit: (1) In failing to ascertain the airworthiness or lack of airworthiness of the aircraft; (2) in permitting the aircraft to stand in open weather without sheltering the same and permitting the tail section thereof to become filled with water, thereby creating weight which defendants knew or should have known would cause the airplane to crash; and (3) in failing to inspect the aircraft before flight was attempted.

The answers of the defendant Aeroservice and defendant Honeywell in effect deny generally the allegations of negligence alleged in the plaintiff's petition.

The defendants assign as error: (1) The trial court erred in overruling defendants' separate motions for a directed verdict. (2) The trial court erred in giving instructions Nos. 3, 4, 5, and 6. (3) The trial court erred in refusing to admit exhibits Nos. 26 and 27 into evidence. (4) The trial court erred in admitting all testimony of witness Esmond Avery, president of Aeroservice, relative to his report of the accident made to the Civil Aeronautics Board.

A motion for a directed verdict must for the purpose

of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can be reasonably deduced from the facts in evidence. See, Dickman v. Hackney, 149 Neb. 367, 31 N. W. 2d 232; Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21.

The defendants' first assignment of error challenges the sufficiency of the evidence to warrant submission to the jury. This requires an analysis of the evidence, and we set forth that part of the same deemed necessary to determine this assignment of error.

It appears from the record that plaintiff enrolled in a school for airplane mechanics operated by Aeroservice, located at the municipal airport near Omaha. He attended day classes from 7 a. m. to 3 p. m., from January 1949, until the occurrence of the accident on June 23, 1949. Just before 3 p. m., on that date he talked to Mr. Evans, secretary of Aeroservice, about renting an airplane to take a ride after school. It was agreed that he would pay $10 for a 45-minute flight, which he did. Honeywell was chief instructor in the mechanics' school, held a commercial pilot's license, and on occasions flew for Aeroservice. He agreed to fly the plaintiff.

The airplane in question is described as a Fairchild aircraft, model M-62-A-3, a low-winged monoplane, the wing being under the fuselage. This is a two-seated plane with dual controls. There is a canopy cover made of plexiglass which fits over the cockpit in a loose manner. This plane was designed as an army training plane and commonly referred to as a PT-26. After World War II these planes were sold as army surplus for civilian use, and Aeroservice purchased this plane.

Throughout the course of the evidence certain features of this plane are referred to, for instance, grommets. A grommet is described as a little celluloid or

plastic washer which is put on the fabric of the airplane merely as a reinforcement ring. The purpose of the grommets is to let water drain out of the interior of the plane. A bulkhead is an annular reinforcement ring made of plywood three-eighths to one and one-half inches thick which runs around the fuselage shell from the back of the cockpit to the tail and gradually gets smaller, tapering off, to give it the shape. In the part of the plane where the tail-wheel assembly joins the fuselage there is a hole approximately 5 inches in diameter. Inside the fuselage where the tail wheel joins the plane, the tail-wheel assembly is built around this hole to a thickness of approximately three-fourths of an inch. This hole is covered with a heavy duck or light leather boot. Its purpose is to keep the dust out of the actuating hydraulic unit.

The plane had not been moved since June 20, 1949. On June 22, 1949, 24 hours prior to the time of the flight, 1.24 inches of rain fell in one hour between 4 p. m. and 5 p. m. This rain was measured at the municipal airport where the plane was parked in the open, and is shown by the records of the United States Weather Bureau. A weather expert testified that 1.24 inches of rain falling within one hour is more than four times the amount classified as "heavy" rain.

There is a conflict in the testimony as to whether the canopy on this plane was closed or open prior to the time of flight.

The plaintiff testified that after obtaining a pilot to fly the plane they procured parachutes. The oil was checked and the plane filled with gasoline. The plaintiff got into the front seat and the pilot in the rear seat from which seat he operated the plane. They taxied to the proper place to await a clearance signal. The pilot "revved" the engine, tested the two magnetos, got a green light from the tower, and proceeded to take off. The plaintiff watched the instruments and paid no attention to what the pilot was doing because he did

not know anything about flying and had never flown by himself. He remembered that after the take-off the pilot banked the plane to the east to miss the Illinois Central Railroad bridge which crosses the Missouri River. The plane crashed on the Iowa side of the river. The plaintiff remembered nothing after the crash.

Honeywell testified that he was the chief instructor at the aircraft mechanics' school and also held a commercial pilot's license. He had flown a PT-26 on many occasions prior to June 23, 1949, when he flew the plane in which the plaintiff was injured. He testified that when he went out to the plane it was tied down. He untied it and opened the canopy. He made a visual check of the plane. He did not examine the grommets, which are in the belly of the plane and run through the fabric ahead of each bulkhead, to ascertain if there was any water in the tail of the plane, nor did he examine the tail-wheel assembly to see whether or not it was clogged. He further testified that there is no set rule or regulation required by the Civil Aeronautics Administration, hereafter referred to as the C. A. A., to ascertain whether or not there is water in the tail of a plane. Before taking off he made an inspection of the various parts of the plane consisting of the stick, engine, the ailerons, rudder controls, and the trim tabs as far as the control in the cockpit is concerned. He also checked the magnetos. After receiving the green light to take off and the plane had gained altitude of 100 feet or more, he noticed it was not climbing as fast as it should. The climb was unusually slow. The plane was not functioning correctly. When he obtained altitude of 225 feet he observed the tail being heavy, which is caused by excessive weight in the tail. There was no indication of a stall. The plane lost altitude. The tail seemed to be pushed down, and this created more drag. He looked for a place to make a forced landing. Later the plane crashed on the Iowa side of the Missouri

River. He estimated that they were in the air about 3 minutes.

Honeywell further testified that it was not raining on that particular day, but it had rained the night before and there had been intermittent flash rains for two or three days previous to the flight. He did not examine the plane two or three days prior to the flight to ascertain if there was any water in any part of it. Water could possibly drip through the looseness of the canopy into the fuselage of the plane. The only way water could get into the tail of the plane would be if the drain grommets were clogged so the water could not drain out. He explained that a tail-heavy condition can be caused otherwise than by water in the tail. It appears from the evidence that none of the other causes existed in this case.

On April 5, 1949, Honeywell conducted a 100-hour inspection of this plane, required by the C. A. A. He was assisted by four mechanics under his direction. His evidence is to the effect that the grommets were not examined to ascertain whether or not they were plugged, or what their condition was. In a deposition taken previous to trial he testified that this plane remained out in the weather at all times and was not hangared; that the weight in the tail was due to the rain accumulating in the tail; and that it was the only logical source he could think of to cause this condition.

The president of Aeroservice testified that he listed the facts as to how the plane crashed on a form required by the C. A. A., which would show his opinion of the cause of the crash and recommendations to prevent recurrence of such a crash. In this report he gave as his opinion, after summarizing the pertinent parts, that it was his belief that this airplane developed a horizontal stabilizer stall due to excessive weight in the rear end, and that as soon as the water had a chance to surge to the tail end, the stabilizer went out due to this excessive weight. In the report to the Safety Bureau of the Civil

Aeronautics Board where he was asked for suggestions for the prevention of recurrences of this or similar failures, he gave the following answer: "I believe all PT-26 and PT-19s should be inspected before flight when they have been setting out following a heavy rain. Also, drain grommets should be put in the belly of the aircraft in front of every stringer."

He testified on cross-examination that his report was not based on actual knowledge because he was not familiar with the construction of a PT-26. After the accident he looked a PT-26 over and found that they had drain grommets in front of every stringer. In his opinion a fire hose could be put in the interior of the plane, and the water would run back out just as fast as it was put in and would not accumulate in the tail section of the fuselage.

The plaintiff offered certain testimony of this witness given by him in a deposition prior to trial as admissions against interest. This evidence is to the effect that the secretary of Aeroservice had a right to authorize the trip; that a PT-26 is a poor airplane, is marginal and bordering on dangerous; that it is too heavy for the horsepower to make it an airplane with a good margin of safety; and that this plane was not in active use for fare-paying passengers but was in dead storage. He did not remember how much it rained the day before the flight but it rained very hard. He ordered no inspection of the plane to ascertain whether any water got into the fuselage or body of the plane. It appears that this plane was used on occasions preceding this flight.

A witness who was in the Army Air Force during World War II and received his primary training in a PT-19, testified that the PT-19 is very similar to the PT-26, the primary difference being that the PT-19 does not have a canopy cover and the PT-26 does, and also, the PT-26 has a 25 horsepower greater engine than the PT-19. This witness, after explaining the position of the bulkheads, the grommets for drainage in the bottom

of the plane, and the construction of the plane, testified that if water got into the fuselage it would drain to the back or tail part of the plane. If the plane had sat out three days or more, taking into consideration the rain as it appears in this case, he testified he would look into the belly of the plane to see if there was water, or anything loose, or any excessive dirt. He testified that you could kneel down and check the drain grommets. This could not be ascertained by looking at the plane from the outside, nor by sitting in the cockpit and looking around.

A major on active duty with the Strategic Air Command, who qualified as a flight test engineer and commercial pilot during World War II, testified that he ferried PT-26s for the Royal Canadian Air Force as a staff pilot and had approximately 200 hours flight time in this type of plane. After World War II he processed or modified ten such planes for civilian use and personally owned such a plane. He is acquainted with the PT-26 with reference to the tail section of the fuselage which begins behind the cockpit and ends down near the rudder. There is a hole in the tail end of the fuselage area approximately 18 inches long to permit the attachment of the tail-wheel assembly. This hole is covered by sheet metal which forms the contour of the airplane and there is a gap approximately that large in the area of the tail-wheel assembly. Assuming that there was 1.23 inches of rainfall in the 18 hours prior to the accident and that some water got into the tail section of the fuselage, he testified that the water would remain there for a period of one to three hours, and the plane being in an idle position water would be forced to run down the fuselage and out the tail area of the plane. There are no grommets in the belly of the plane, but there are six or eight the length of each spar in the trailing edge of the wing. There are drain holes in the tail section, but he did not believe these were grommets. He further testified that the final obstruction in the tail is only three-fourths of an inch in thickness, and the cut-away sections for the

former strips would allow the water to drain that far anyway. If the plane was properly cared for there would be no occasion for anything there to obstruct it.

An airplane mechanic and shop supervisor for an aircraft company which makes all kinds of repairs on planes, and who had previously been in the employ of Aeroservice, was designated an inspector for the Civil Aeronautics Administration. In this capacity he inspected planes for airworthiness. He testified that once a year, regardless of the number of hours flown, a certificate is required by the C. A. A. as to the inspection. This is tantamount to relicensing the plane. When PT-26s were sold as army surplus, they were required to be certified by the C. A. A. for airworthiness. He inspected approximately 100 such planes with the purpose of converting them to civilian use. He described a PT-26 and identified marks made on an exhibit for demonstration purposes, and mathematically determined the center of gravity of this plane and planes of this type. He then testified that in his opinion 2½ gallons of water could not accumulate in the tail section of a PT-26. Further, assuming 1.26 inches of rain had fallen between the hours of 4 p. m. and 7 p. m. the day before the accident and there was no rain for 20 hours prior to that time, and the canopy of the plane was open, enough water could not accumulate to disturb the center of gravity beyond tolerances as prescribed by the C. A. A., or, in other words, that enough water could not accumulate to disturb the flight characteristics of the plane. He further testified that this plane was designed to be hangared outdoors.

A witness who had been an instructor in the Army Air Force and a commercial pilot testified with reference to a PT-19 used for training purposes in the military service which is similar in construction to a PT-26 and with which he is familiar, and that on the field where he instructed these planes stood out in the weather and were taken in only for 20-hour or 100-hour inspections. In the event anything appeared to be wrong with the

plane mechanics would work on it. The ground crews were charged with seeing that the planes were gassed and oiled; that it was not customary to inspect the interior or tail fuselage for the accumulation of water before flight; and that no instructions were given to cadets to make such inspection nor did the instructor inspect the planes for such purpose.

In this case the defendant Aeroservice is a private carrier, that is, not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a special contract, and liable for only such loss or injury as results from a failure to exercise ordinary care. See, 9 Am. Jur., Carriers, § 10, p. 435; 6 Am. Jur., Aviation, § 60, p. 36.

This court, in In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526, had before it negligence involved in the operation of an airplane. We applied the rule: " 'In the absence of statutes covering the operation and management of airplanes at the time and place of an accident, * * * the rules of law applicable to torts—the ordinary rules of negligence and due care—obtain. Thus, the rule of the common law that every person shall use ordinary care not to injure another, that is, such care as the great mass of mankind would use under the same or similar circumstances or such care as the ordinarily prudent person would use under the same or similar circumstances, applies. * * * The care must be commensurate with dangerous consequences to be reasonably apprehended; it may be of a very high degree under some circumstances and of a slight degree under others.' " See, also, 6 Am. Jur., Aviation, § 60, p. 36; 2 C. J. S., Aerial Navigation, § 19, p. 907; Greunke v. North American Airways Co., 201 Wis. 565, 230 N. W. 618, 69 A. L. R. 295; Kasanof v. Embry-Riddle Co., 157 Fla. 677, 26 S. 2d 889.

The rules of law above announced would be no different in the instant case where negligence is involved in the maintenance and inspection of an airplane before

flight carrying a fare-paying passenger. The defendants were under no duty to use the highest degree of care, but to use that degree of care that men of reasonable diligence and foresight would ordinarily exercise. This case was tried in accordance with the foregoing rules of law.

The defendants argue that the plaintiff must prove by a preponderance of the evidence that water got into the tail or fuselage of this airplane causing excessive weight in that part of the plane which constituted the proximate cause of the accident. In this connection, a PT-26 was designed to be left out in the open in any type of weather, was so constructed that water would drain out of the tail and the fuselage, and a sufficient quantity of water would not accumulate so as to disturb the flight characteristics of the plane. Defendants further argue that there is no C. A. A. regulation requiring such inspection, therefore, as a matter of law, there was no duty on the part of the defendants under the facts in this case to inspect the plane to ascertain whether or not there was water in the tail or fuselage; and that this is made clear by the testimony of defendants' experts, Major Miller, Mr. Miller, and Mr. Stuenkel.

The evidence discloses that this plane was in the open with the canopy possibly open; and that there was a downpour of rain approximately 19 hours before time of flight equal in intensity to four times "heavy" rain. This investigation for the accumulation of water in the tail or fuselage would be a simple matter. It could be accomplished by kneeling down to insert a pointed object through the drain holes to ascertain if they were clogged or free from obstructions, and examining the fabric around the lower portion of the fuselage and the tail of the plane. The dangerous consequences to be reasonably apprehended would be initially the accumulation of water in the plane which would affect the weight and balance of the plane, which is an important matter to be considered before any flight. The

evidence disclosed a tail-heavy condition in this plane which could and did result in a serious accident. This type of inspection is just as important as ascertaining the sufficiency of the fuel and oil, and the operation of the engine.

We believe the following language in 38 Am. Jur., Negligence, § 24, p. 668, is applicable: "Liability for negligence may be predicated upon the lack of foresight or of forethought which is exhibited where one remains in voluntary ignorance of facts respecting the danger inherent in the particular act or instrumentality involved, concerning which a reasonably prudent person would become advised, on the theory that such ignorance is the equivalent of negligence. Inattention to the duty to exercise care in a situation which reasonably may be regarded as hazardous is negligence, notwithstanding the act or omission involved would not in all cases, or even ordinarily, be productive of injurious consequences."

In 38 Am. Jur., Negligence, § 24, p. 670, it is said: "The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care."

The rules of law relating to the operation of aircraft, in the absence of statute, in general are rules relating to negligence and nuisance, and are not distinguishable from those which relate to the operation of vehicles, perhaps, more closely to motor vehicles on land. It is assumed that the pilot of an airplane, like the driver of an automobile, is charged with a duty toward a passenger for hire in such plane commensurate with the nature of the instrument employed and with the duty imposed on him by law. See, Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N. E. 212, 83 A. L. R. 329; Greunke v. North American Airways Co., *supra;* Read v. New York City Airport, Inc., 145 Misc. 294, 259 N. Y. S.

245; Annotation, 12 A. L. R. 2d 677-679.

In applying the rules of negligence governing in tort cases to land-operated vehicles which fall under the same rules of negligence, the owner or driver of a motor vehicle must exercise reasonable care, in the inspection of his machine, to discover any defects that may prevent its proper operation, and is chargeable with knowledge of any defects which such inspection would disclose. See 2 Blashfield, Cyclopedia of Automobile Law and Practice, § 821, p. 1.

In Boele v. Colonial Western Airways, Inc., 110 N. J. L. 76, 164 A. 436, a case wherein an airplane accident occurred because of defective parts of an engine and at least two passengers were killed, the trial court instructed the jury to the effect that the defendant was required to make a proper inspection of the plane before flight, which is in effect the same as the rule above stated with reference to the inspection of an automobile.

The defendants assert that negligence is never presumed and not to be inferred from the mere fact that an accident happened. If the cause of the accident is not ascertained except as a matter of guess, conjecture, or surmise, the defendant would then be entitled to prevail. An abundance of authorities support the above proposition.

In addition to direct evidence, or in the absence of the same, circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. See, Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614; Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533; Anderson v. Interstate Transit Lines, 129 Neb. 612, 262 N. W. 445; Zimmer v. Brandon, 134 Neb. 311, 278 N. W. 502.

A plaintiff is not bound to exclude the possibility that

the accident might have happened in some other way, but is only required to satisfy the jury, by a fair preponderance of the evidence, that the injury occurred in the manner claimed. See, Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712; Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367; English v. Miller (Tex. Civ. App.), 43 S. W. 2d 642. See, also, Boele v. Colonial Airways, *supra.*

We conclude, in the light of the authorities cited and from an analysis of the evidence, that the evidence was sufficient to warrant submission to the jury of the question of negligence on the part of the defendants. The defendants' assignment of error cannot be sustained.

The defendants contend the trial court erred in admitting all of the testimony of the witness Esmond Avery, president of Aeroservice, relative to his report of the accident made to the C. A. A.

In the instant case the witnesses Avery, president of Aeroservice, and Honeywell in depositions qualified as experts in their field. Avery also made a report to the C. A. A. We deem it unnecessary to repeat this evidence. The admissions of these witnesses related to a material issue—the theory as to how the accident happened—and were clearly admissible when it appears from the evidence that these witnesses subsequently, at the trial, changed their positions wherein it was urged the crash was caused by forces other than the rain and water accumulation.

The declarations and admissions of a party to an action, against his own interest, upon a material matter, are admissible against him as original evidence. See, Havlik v. Anderson, 130 Neb. 94, 264 N. W. 146; McDaniel v. Farlow, 132 Neb. 273, 271 N. W. 905; Brown v. Hyslop, 153 Neb. 669, 45 N. W. 2d 743; O'Hare v. Peterson, 150 Neb. 151, 33 N. W. 2d 566.

We conclude the defendants' assignment of error cannot be sustained.

The defendants predicate error on the refusal by the

trial court to receive exhibits Nos. 26 and 27 in evidence. Exhibit No. 26 was identified as the airworthiness certificate issued by the C. A. A. on April 5, 1949, belonging to the plane involved herein. Exhibit No. 27 was a periodic aircraft inspection report on the plane involved, signed by Honeywell as mechanic. This was an inspection required by the C. A. A. to be done every 100 hours of flight, or once a year regardless of the hours flown, for a relicensing of the plane by the C. A. A. The purpose for which these exhibits were offered was to show the airworthiness of the PT-26 involved in the accident and that the regulations in regard to maintenance and safety with respect thereto had been complied with.

It appears from the record that all facts relating to the exhibits were testified to in detail by various witnesses at the trial. The trial court has a wide discretion in determining the relevancy and materiality of exhibits such as these, and in determining whether or not they are so remote in time as to have any bearing upon the issues. In any event, the failure to admit these exhibits does not constitute reversible error, and the defendants were not prejudiced thereby.

The defendants predicate error on the giving by the trial court of instructions Nos. 3, 4, 5, and 6.

Instruction No. 3, insofar as necessary to consider, is in substance as follows: (1) It places the burden of proof on the plaintiff to establish by a preponderance of the evidence that the defendants were negligent in failing to adequately inspect the airplane before flight was attempted; and (2) that such negligence was the proximate cause of the injury and damages sustained by the plaintiff.

The contention is that this instruction indicates that the plaintiff is not obligated to carry the burden of proof which he must do to prove that water got into the plane, stayed there, and caused the tail-heavy condition which resulted in the crash; and that the jury is not entitled

to speculate or surmise as to other reasons.

In instruction No. 1 given by the trial court, the jury was advised of specific negligence claimed by the plaintiff in the following language: "* * * negligence on the part of the defendants in failing adequately to inspect the aircraft before flight, and * * * that the aircraft was permitted to stand in the open weather without shelter, and that the tail section thereof became filled with water and created a weight which such inspection would have disclosed and which weight made the airplane unmanageable; * * *." In addition, in instruction No. 5, the jury was instructed: "If whatever caused the plane to have a tail-low position or tail-heavy position, the burden of which is upon the plaintiff to establish by a preponderance of the evidence, could, in the exercise of ordinary care, have been discovered by reasonable inspection of the plane before use, the defendants would be negligent in failing to make such inspection."

When instruction No. 3 is considered in connection with instructions Nos. 1 and 5, it is obvious that the court adequately instructed on the burden of proof required of the plaintiff.

We have examined the other instructions complained of by the defendants and find no prejudicial error therein. The following authorities are applicable.

In Brown v. Hyslop, *supra*, the court said: "The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear. If different instructions are given on the same subject they should be considered together, and if they fairly submit the case, it will not be reversed for indefiniteness or ambiguity in one of the instructions." See, also, In re Estate of Kinsey, *supra*.

For the reasons given herein, the judgment entered on the verdict by the trial court should be, and the same is hereby, affirmed.

AFFIRMED.

## L. S. "BOB" CORNETT, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

53 N. W. 2d 747

Filed June 6, 1952. No. 33137.

1. **Contempt: Attorney and Client.** The Supreme Court of the state has the sole power to punish for contempt a person assuming to practice law within the state without having been licensed to do so.
2. **Contempt.** In determining the sufficiency of an information, the test is whether or not enough remains after rejecting all unnecessary averments thereof to satisfy the requirements of a sufficient information.
3. ———. If the conduct charged is contemptuous of the district court and of the Supreme Court at the same time, the wrongdoer may be proceeded against in the district court for so much of the conduct that constitutes a constructive contempt of that court.
4. ———. If the facts pleaded in an information in contempt clearly show that the act complained of was willful, the information is not fatally defective for failure to use the word "willful."
5. ———. The issuance of an order to show cause as a means of obtaining jurisdiction of the person of the defendant does not have the effect of shifting the burden of proof from the state to the defendant.
6. ———. A proceeding for a constructive contempt must be instituted in the court toward which the contempt is directed.
7. ———. When the facts pleaded in an information charging a constructive criminal contempt show that the contempt was directed toward the court in which the proceeding was filed, the information is sufficient to confer jurisdiction upon that court.
8. ———. Where a person, for the purpose of securing money for himself, falsely pretends or insinuates to another who is interested in pending litigation that he can corruptly influence the course of the suit by approaching officers of the court with money, his conduct is contemptuous of the court toward which it is directed.
9. ———. Where the purpose of an act is to create in the mind of another a belief that courts or their officers are dishonest and that justice can be bought, it constitutes a hindrance to the due administration of justice which the court toward which it is directed may punish to vindicate the dignity and majesty of the court and to preserve its authority and integrity.
10. **Constitutional Law.** The judgment and the proceedings upon which it is based are not violative of Article 1, sections 3 and 11,

Constitution of Nebraska, nor of Article 14, section 1, Constitution of the United States, commonly referred to as the due process provisions of the state and federal Constitutions.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

*Eugene D. O'Sullivan, Eugene D. O'Sullivan, Jr., Warren C. Schrempp, David S. Lathrop,* and *Ernest S. Priesman,* for plaintiff in error.

*Clarence S. Beck,* Attorney General, and *William T. Gleeson,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

Defendant was proceeded against for a constructive criminal contempt. The trial court found the defendant guilty and sentenced him to serve 60 days in the Douglas County jail and pay a fine of $1,000 and costs. Defendant seeks a review in this court by petition in error.

Defendant is a professional bondsman at Omaha, Nebraska. This proceeding grew out of the following state of facts: One Dwight Miller, Jr., a resident of Council Bluffs, Iowa, was charged with the commission of the crime of grand larceny in Douglas County, Nebraska. He was arrested in Council Bluffs on August 29, 1951, and immediately admitted his guilt. He waived extradition and was removed to Douglas County, Nebraska, where he expressed a desire to plead guilty. An information was thereupon filed in the district court for Douglas County on August 30, 1951, but defendant, being apprised of his rights by the assistant public defender of Douglas County and after consultation with his wife and parents, decided not to plead guilty immediately and sought his release on bond. The parents of Dwight Miller, Jr., Mr. and Mrs. Dwight Miller, Sr., also being residents of the State of Iowa and owning no property within the State of Nebraska, were advised

that the defendant, Bob Cornett, would be the "best bet" for obtaining an appearance bond. They, together with the wife of Dwight Miller, Jr., thereupon contacted the defendant and entered into negotiations and agreements with him out of which the present charge of constructive criminal contempt arose.

The evidence shows that Mr. and Mrs. Dwight Miller, Sr., called at defendant's office on the same day but were advised that defendant was out and would not return until the next morning. They had learned that the appearance bond had been fixed at $5,000 and that defendant charged $10 per $100 for furnishing an appearance bond. They offered to leave $500 with one George Vanous with whom they talked at defendant's office. He refused to accept it and advised them to see the defendant at 8:30 a. m. the next day. The wife and parents of Dwight Miller, Jr., came to defendant's office the next morning. Defendant inquired about the case, whether or not Miller had pleaded guilty, and impressed them with the seriousness of the situation. He advised them that he would see what could be done and that they should return to his office at 11:30 a. m. On their return to the office they were advised by defendant that he could "take care of the case," that the expense would be "about a thousand dollars," and that he could get Dwight Miller, Jr., out of jail "with no strings attached" for the above-named sum. Dwight Miller, Sr., thereupon paid defendant $500 in cash and agreed to pay a further sum of $500 within a few days. Defendant then advised the Millers to keep quiet about the transaction and to talk to no one. He advised them also to inform Dwight Miller, Jr., that he should "keep his mouth shut and just tell only his name." The record shows also that defendant visited Dwight Miller, Jr., in the city jail, discussed the case and informed him that "it would cost a lot of money," and that he was not to talk to anybody unless he sent them up to see him. Defendant thereupon engaged one Philip Abboud, an attorney, to

represent Dwight Miller, Jr. On September 1, 1951, Dwight Miller, Jr., upon the advice of Abboud, entered a plea of guilty to the charge of grand larceny. Sentence was deferred. The parole officer investigated the case and reported to the court. On September 12, 1951, the district court for Douglas County suspended sentence and paroled Dwight Miller, Jr. After meticulously pleading the foregoing facts in Count One of the information, the concluding paragraph thereof states: "That the said defendant, L. S. 'BOB' CORNETT, is not licensed or authorized to practice law in the State of Nebraska; that such conduct by the said defendant, L. S. 'BOB' CORNETT, constitutes the practice of law in the State of Nebraska and is illegal and was and is a hindrance to the administration of justice in proceedings had or proceedings pending before the courts of this state; and that by reason of the foregoing the said defendant, L. S. 'BOB' CORNETT, is in contempt of court." The second count of the information was dismissed by the State and consequently presents no issue here.

The defendant has set out numerous alleged errors in bringing the case here for review. We think, however, that they involve essentially three questions. Did the court have jurisdiction of the action? Is the information sufficient to state a cause of action against the defendant? Is the evidence sufficient to sustain the judgment of the trial court?

It is the contention of the defendant that the information charges him with a constructive criminal contempt in that he was practicing law without a license to do so and that such an offense is within the exclusive jurisdiction of the Supreme Court of this state. It cannot be questioned that the Supreme Court has the exclusive power to determine the qualifications of persons who may be permitted to practice law in this state and possesses the exclusive power to disbar licensed attorneys who have violated the trust reposed in them as such. It also has the inherent power to punish by

contempt proceedings those persons who engage in the practice of law without a license to do so. Where the Legislature has not made the unauthorized practice of law a statutory crime, the Supreme Court has the exclusive power to punish those who practice law without a license. This is so because the contempt is directed at the court having the exclusive power to define the practice of law, to determine the qualifications of persons to be admitted to the practice of law, and to disbar those admitted to the practice of law who have violated their trust. These conclusions are supported by the following cases: State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N. W. 95; State ex rel. Wright v. Barlow, 132 Neb. 166, 271 N. W. 282; In re Integration of Nebraska State Bar Assn., 133 Neb. 283, 275 N. W. 265, 114 A. L. R. 151; State ex rel. Wright v. Hinckle, 137 Neb. 735, 291 N. W. 68; State ex rel. Johnson v. Childe, 139 Neb. 91, 295 N. W. 381; State ex rel. Johnson v. Childe, 147 Neb. 527, 23 N. W. 2d 720. In the last case cited this court specifically held: "The power to define what constitutes the practice of law is lodged with this court. The sole power to punish any person assuming to practice law within this state without having been licensed to do so also rests with this court."

We necessarily hold that the district court for Douglas County was without jurisdiction to try the defendant on the charge of committing a constructive criminal contempt by engaging in the practice of law without having been licensed to do so.

The Attorney General insists, however, that the information before us charged not only that defendant was practicing law without a license, but that, in addition thereto, defendant's conduct "was and is a hindrance to the administration of justice in proceedings had or proceedings pending before the courts of this state." It will be noted from the paragraph of the information from which this allegation is taken, which paragraph is hereinbefore quoted, that the contempt charged is

practicing law without a license and the hindrance of the administration of justice. The two allegations alleged to constitute criminal contempt are in the conjunctive, and either, if established, under the circumstances here shown is sufficient to sustain the charge if made in a court having jurisdiction. The fact that the district court may not have had jurisdiction to try the one does not deprive it of its jurisdiction to try the other. If the conduct charged is contemptuous of the district court and of the Supreme Court at the same time, the wrongdoer may be proceeded against in the district court for so much of the conduct that constitutes a constructive contempt of the district court. This is so even if both contempts are charged. The information may be subject to a proper motion or plea, but otherwise the allegations or conclusions charging a constructive contempt over which the Supreme Court has exclusive jurisdiction will be treated as surplusage when no prejudice results. This whole question, we think, is controlled by the reasoning in Blodgett v. State, 50 Neb. 121, 69 N. W. 751, wherein it is said: "Much has been said in argument respecting the joinder of the proceeding for disbarment with the prosecution for contempt. We are, however, unable to perceive any substantial objection to the practice complained of. There was, it should be observed, no motion or request for an order requiring the county attorney to elect between the two counts of the information. Where two or more distinct felonies, arising out of different transactions, are charged in the same indictment or information, the prosecutor will, on motion of the accused, be required to elect upon which he will proceed. * * * But the information in this case is, we think, free from the vice imputed to it. Where different criminal acts constitute parts of the same transaction, they may be joined in the same indictment or count thereof. * * * But, in general, unnecessary averments in an indictment or information 'may be treated as mere waste material,

to pass unnoticed, and having no legal effect whatever.' (1 Bishop, Criminal Procedure, sec. 478.) The test by which to determine the sufficiency of an indictment is 'whether enough remains after the rejection of all redundant matter to satisfy the requirement of the law.' And the remedy of the accused is, in every such case, by plea, and not by motion to strike the unnecessary averments."

The record does not disclose that any prejudice resulted to the defendant. In the oral arguments of defendant's motion to quash the information, which were made a part of the record at the instance of the defendant, the prosecution contended that a charge of criminal contempt, in that defendant's conduct was and is a hindrance to the administration of justice, was included in Count One of the information. The court, in ruling on the motion to quash, made it clear as shown by the record that such charge was included. Defendant was fully advised of this fact before the case went to trial. He filed an answer. At the close of the State's evidence defendant moved for a dismissal of the case, which was denied. Defendant elected not to offer evidence, and stood upon the record. The motion to dismiss and the motion to quash were thereupon renewed and overruled. The record thus made fails to show affirmatively that defendant was prejudiced; in fact it shows affirmatively that he was not.

It is urged that the information is fatally defective in failing to allege that the conduct complained of was willful. A contempt proceeding is sui generis and, while it partakes of the nature of a criminal proceeding, it is neither criminal nor civil. A contempt should be charged with the particularity of a criminal complaint. In the instant case the facts are meticulously pleaded in detail. The word "willful" is not used, but the recitals of the information show clearly that it was willful. This is all that is required in a constructive criminal contempt. Nebraska Children's Home Society v. State,

57 Neb. 765, 78 N. W. 267; Kammer v. State, 105 Neb. 224, 180 N. W. 39.

It is contended that the court, in issuing an order to show cause, thereby shifted the burden of proof to the defendant. There is no merit to this contention. Whatever method may have been used in obtaining jurisdiction of the person of the defendant, the burden of proof was upon the State to prove its case beyond a reasonable doubt. The trial court recognized and applied this rule.

Defendant argues that the information is fatally deficient in that it fails to specify the court toward which the contemptuous conduct was directed by using the words "was and is a hindrance to the administration of justice in proceedings had or proceedings pending before the courts of this state." There can be no doubt that a proceeding for a constructive contempt must be instituted in the court toward which the contempt is directed. The quoted allegation of the information, standing alone, would not be within the rule. But other portions of the information clearly show that Dwight Miller, Jr., was charged with the crime of grand larceny in the district court for Douglas County. He was arraigned, pleaded guilty, and was paroled by that court according to the information itself. Every act of the defendant had to do with the disposition of the case by the district court for Douglas County and the information so shows. That the alleged contempt was directed toward the district court for Douglas County is sufficiently pleaded in the information, although the conclusion drawn in the last paragraph of Count One is somewhat deficient in that respect. The irregularity, if it may be classed as one, appears to be controlled by the provisions of section 29-1501, R. R. S. 1943. The record clearly shows that no prejudice resulted from the claimed error. Kirchman v. State, 122 Neb. 624, 241 N. W. 100.

The charge contained in the information over which the district court for Douglas County had jurisdiction

was that the conduct of the defendant was and is a hindrance to the administration of justice in proceedings had or proceedings pending before the courts of this state. This is almost identical with subdivision (4) of section 25-2121, R. R. S. 1943, whereby the Legislature defined and enumerated contempts of court which could be punished in courts of record. While this statute is merely declaratory of powers that inhere in the courts and which exist irrespective of statute, nevertheless it is a clear indication that the Legislature as well as the courts consider the hindrance of the due administration of justice as contemptuous. Defendant argues, however, that he did not hinder justice. He claims his acts, if anything, speeded up justice; that in a matter of four days Dwight Miller, Jr., pleaded guilty and within two weeks thereafter he was paroled. The argument completely overlooks the real meaning of the term to "hinder the due administration of justice" which a court of record may properly punish.

The evidence in this case shows that the Millers called at the office of the defendant to procure an appearance bond for Dwight Miller, Jr., which they had learned would cost $500. They had $500 with them. Defendant was not in and they were required to return early the next morning. Defendant made inquiry about the case, the past record of Dwight Miller, Jr., and advised that he would investigate and give his answer at a later hour that morning. At the appointed time defendant stated that he could take over the case, that the expense would be about $1,000, and that he would get Dwight Miller, Jr., out of jail with no strings attached. He accepted $500 in cash, and the Millers agreed to pay another $500 within a few days. Defendant admonished the Millers to keep quiet about the whole transaction and to advise Dwight Miller, Jr., to do likewise. No discussion about an appearance bond appears to have been had on the latter occasion and the defendant never at any time furnished an appearance

bond. The defendant did not tell the Millers how he would get Dwight Miller, Jr., out of jail with no strings attached. The record clearly shows that he led the Millers to believe that he had influence with the right persons, or that in some mysterious manner he could use the $1,000 to pay expenses in securing the release of Dwight Miller, Jr., with no strings attached. The information in the present case was filed on September 11, 1951. On September 12, 1951, defendant returned the $500 to the Millers. The defendant contends that this evidence, even if true, does not hinder the administration of justice. We think it does.

The rule is that one who, for the purpose of securing money for himself, falsely pretends or insinuates to another who is interested in the litigation that he can corruptly influence the course of the suit by approaching officers of the court with money or anything of value, is guilty of a contempt of the court toward which it is directed. Its deliberate purpose is to create in the mind of the hearer a belief that courts or the officers thereof are dishonest and that justice can be bought if the right contacts are made. Such conduct is calculated to hinder and obstruct the due administration of justice and its effect is to lessen the authority, dignity, and integrity of courts generally, and particularly the one toward which it is directed. Little v. State, 90 Ind. 338, 46 Am. R. 224; Ex Parte John D. Crews, 127 Fla. 381, 173 S. 275. In the rehearing of the latter case it was said: "The alleged conduct was calculated to destroy all respect for the court and whether or not it actually impeded justice is immaterial." 127 Fla. 391, 173 S. 279. See, also, Sinclair v. United States, 279 U. S. 749, 49 S. Ct. 471, 73 L. Ed. 938, 63 A. L. R. 1258; Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186.

The evidence is sufficient to sustain the findings and judgment of the court under the required quantum of proof. The contempt is a most pernicious one and the

trial court was justified in imposing the judgment it did to vindicate the dignity and majesty of the court and to preserve its authority and integrity.

Lastly, the defendant asserts that the proceedings had in the district court are violative of defendant's rights under Article 1, section 3, and Article 1, section 11, of the Constitution of Nebraska, and Article 14, section 1, of the Constitution of the United States. The foregoing are generally referred to as the due process provisions of the state and federal Constitutions. On this subject the facts are: An information was filed in a court having jurisdiction to hear it. It properly charged the defendant with a constructive criminal contempt which was within the power of the court to hear. The defendant was served with process and he procured the assistance of able counsel. Defendant filed an answer. All of the evidence was by witnesses who personally appeared and testified. They were cross-examined at length. The defendant elected to adduce no evidence as he had a right to do. The evidence sustains the findings and judgment of the trial court. To us this is due process, not the want of it.

AFFIRMED.

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MILDRED JACOBSEN ET AL., APPELLANTS, V. STELLA FARNHAM ET AL., APPELLEES.
53 N. W. 2d 917

Filed June 6, 1952. No. 33149.

1. **Quieting Title: Wills.** In actions to quiet title and to enforce legacies, the district court has jurisdiction to construe a will in determining the rights of the parties to the lands or legacies under the will.
2. **Wills.** In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law.

3. ———. In determining a testator's intention, the court must examine a will in its entirety, giving consideration to its every provision, giving words used their commonly and generally accepted literal and grammatical meaning, and indulge the presumption that testator understood the meaning of the words used.
4. Wills: Evidence. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. Such evidence is not admissible to determine the intent of the testator where the ambiguity is patent and not latent.
5. Wills. A patent ambiguity is one which appears upon the face of the instrument, which must be removed by construction according to settled legal principles and not by evidence, and the intention of the testator is to be determined from the four corners of the will itself.
6. ———. When an instrument consists partly of written form, whether in script or typewriting, and partly of printed form, the former controls the latter where the two are inconsistent.
7. ———. Any technical distinction between the words "devise" and "bequeath" will not be permitted to defeat the purpose of a testator, since they may be construed interchangeably or applied indifferently to either real or personal property if the context shows that such was the intent of the testator.
8. Wills: Property. The word "possessions" may include real estate if so intended, although such is not its technical meaning.
9. ———: ———. The words "all my worldly possessions" are ordinarily sufficient, if not qualified, to mean real estate; but it is otherwise if it appears from the context that personal estate only was in contemplation of the testator.
10. Wills. It is a natural presumption that a testator making his will intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption has weight, but it cannot supply the actual intent of the testator to be derived from the language of the will.
11. ———. The presumption that a testator intended by his will to fully dispose of his estate will not overcome the rule requiring express provision or necessary implication to disinherit an heir.
12. Wills: Descent and Distribution. Real estate not disposed of by will becomes intestate property and descends to the heirs at law of the testator.

APPEAL from the district court for Sarpy County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

*Mathews, Kelley, Fitzgerald, Mathews & Delehant,* and *McGinn & McGinn,* for appellants.

*Collins & Collins,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiffs, as legatees and claimed devisees named in paragraph second of the last will and testament of Nettie C. Griffin, deceased, brought this action against defendants, heirs at law of deceased and others interested in her estate, to quiet title in plaintiffs to Lot 7 in Butterfield's Subdivision in the northeast quarter of the northeast quarter of Section 10, in Township 13 North, Range 13 East of the 6th P. M., in Sarpy County, Nebraska.

The primary issue involved in the trial court was construction of the will to determine whether such real estate owned by decedent at the time of her death was thereby devised to plaintiffs as claimed by them, or whether it bequeathed only personal property to plaintiffs and the real estate descended to her heirs at law under the intestate laws of this state, as claimed by defendants. The trial court, after hearing upon the merits, construed the will, finding and adjudging that the will bequeathed only decedent's personal property to plaintiffs, and that the real estate descended as intestate property to certain named persons who, as stipulated by the parties, were the sole heirs at law of testatrix at the time of her death.

Plaintiffs' motion for new trial was overruled and they appealed, assigning that the judgment was not sustained by the evidence, but was contrary thereto and contrary to law. We conclude that the assignments should not be sustained.

The pertinent facts are not in dispute. They are as follows: The will was executed by testatrix on February 23, 1949. It was prepared on a "Short Will" printed form by a former grocer then engaged in the

insurance business and unauthorized to practice law, who also acted as one of the witnesses. Testatrix died on June 19, 1949, and the will was subsequently duly probated. Her sole surviving heirs at law were James P. Smith, Stella Farnham, Viola Cozad, Mildred Jacobsen, Nora Hammerstrom, Morris Smith, and Floyd Smith. James P. Smith and Stella Farnham were subsequently deceased. Mildred Jacobsen is the only plaintiff here who was an heir at law of testatrix.

At the time of her death testatrix owned the real property here involved. It was her home in Fort Crook, Nebraska. Its value is not shown but there is evidence that she had lived in such property since at least 1906. She also owned the household goods and furniture therein; a balance of money due on a contract for sale of another parcel of real estate, deed to which had been placed in escrow pending settlement which has since been completed; and an unspecified amount of money allegedly on deposit in a bank but subsequently withdrawn and not yet accounted for by a former discharged administrator with the will annexed. An application citing such prior administrator to account therefor has not yet been adjudicated. The household goods and furniture were sold and together with money otherwise collected, the present administrator with the will annexed had in excess of $1,000 in his hands at time of trial.

Insofar as important here, the second provision of the will provides: "SECOND, After the payment of such funeral expenses and debts, I give, devise, and bequeath To my beloved Niece Mildred Jacobson, My beloved Nephew Earl Rodman and my boloved (beloved) Great Nephew Robert E. Bergstrum *all of my worldly posessions* (possessions) *both personal and moneys which I now have may die posessed* (possessed) *of or may be entitled to.* They to each share equally and share alike." (Italics supplied). There was no residuary clause.

The words "SECOND, After the payment of such funeral expenses and debts, I give, devise, and bequeath"

were a part of the printed form and the rest of the paragraph was a typewritten expression of testatrix. The persons named in the will are plaintiffs in this action. They argued that, in the light of the language used and the alleged presumption that testatrix intended to dispose of her entire estate, the will should be construed as not only bequeathing all of decedent's personal property to them but also as devising all of her real property to them. We conclude otherwise.

As stated in Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551, citing cases from this jurisdiction: "We are also committed to the view that in actions to quiet title, * * * and to enforce legacies, * * * the district court has jurisdiction to construe a will in determining the rights of the parties to the land or legacy under the will."

In Dumond v. Dumond, *ante* p. 204, 51 N. W. 2d 374, this court said: "In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law. Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797; Dennis v. Omaha National Bank, 153 Neb. 865, 46 N. W. 2d 606. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. Borah v. Lincoln Hospital Assn., 153 Neb. 846, 46 N. W. 2d 166. Such evidence is not admissible to determine the intent of the testator where the ambiguity is patent and not latent. In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739. A patent ambiguity is one which appears upon the face of the instrument. It must be removed by construction according to settled legal principles and not by evidence, and the intention of the testator is to be determined from the four corners of the will itself. The controverted provision of the will in the case here presented is one appearing upon the face of the instrument and is there-

fore a patent ambiguity." Such statement is applicable and controlling here.

Also, as held in Olson v. Lisco, 149 Neb. 314, 30 N. W. 2d 910: "In determining a testator's intention, the court must examine a will in its entirety, giving consideration to its every provision, giving words used their commonly and generally accepted meaning, and indulge the presumption that testator understood the meaning of the words used." See, also, Brandeis v. Brandeis, 150 Neb. 222, 34 N. W. 2d 159; and Roberts v. Roberts, 147 Neb. 494, 23 N. W. 2d 774, wherein it was held that: "Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning."

It will be noted that the word "devise" appears in the will as a part of the printed form. In that regard, this court, applying section 25-1216, R. R. S. 1943, held in Mack Investment Co. v. Dominy, 140 Neb. 709, 1 N. W. 2d 295: " 'When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent.' * * * Typewriting is writing within the contemplation of the statute, providing that, when an instrument consists partly of written and partly of printed form, the written controls the printed form, where the two are inconsistent." Therefore, the typewritten part, with which "devise" is apparently inconsistent, will control in construing the will. In any event, as stated in Black's Law Dictionary (3d ed.), p. 573, citing numerous cases: "The term 'devise' is properly restricted to real property, and is not applicable to testamentary dispositions of personal property, which are properly called 'bequests' or 'legacies.' But this distinction will not be allowed in law to defeat the purpose of a testator; and all of these terms may be construed interchangeably or applied indifferently to either real or personal property, if the context

shows that such was the intention of the testator."

We are concerned then with the construction of "all of my worldly posessions (possessions) both personal and moneys which I now have may die posessed (possessed) of or may be entitled to."

As stated in 57 Am. Jur., Wills, § 1338, p. 887: "The word 'possessions' may include real estate if so intended, although this is not its technical meaning." In 2 Schouler on Wills (6th ed.), § 1126, p. 1284, it is said: "Where one gives his 'possessions' by will, the word seems applicable prima facie to both real and personal property, as it certainly is where associated words and the context imply such an intention. But the word 'possessions' is seldom used by a professional draftsman; and whenever used, its scope must yield to the testator's probable meaning, * * *." In 33 Words and Phrases, p. 108, it is said: "That the words 'property, possessions, or estates' are sufficient if not qualified to carry real estate, is well settled by many decisions, but it is otherwise if it appears from the context that personal estate only was in contemplation of the parties."

In 72 C. J. S., Possession, p. 234, it is said: "The word 'possession' is also defined as meaning the thing possessed; that which anyone occupies, owns, or controls; and in this sense, as applied to the thing possessed, the word is frequently employed in the plural, denoting property in the aggregate; wealth; and it may include real estate where such is the intention, although this is not the technical signification."

As stated in 49 C. J., Possession, § 7, p. 1096: "As applied to the thing possessed, usually in the plural, the word is used in some of the books in the sense of property, and may, no doubt, include real estate if so intended, although such would not be its technical signification, in its primary meaning a possession being a hereditament or chattel." See, also, Black's Law Dictionary (3d ed.), p. 1383.

In Blaisdell v. Hight, 69 Me. 306, 31 Am. R. 278, a

leading case, it is said: "The word 'possessions' may, no doubt, include real estate, if so intended, though such would not be its technical signification. Bouvier so declares in his law dictionary. The words 'all I may die possessed of,' may include real estate * * * or may not * * * just according to the context with which the words are associated. * * * Had the testator intended to include real estate in the word 'possessions,' it strikes us forcibly that he would not have used the prefix 'personal' at all, * * *. The word 'personal' was manifestly used to qualify and describe both estate and possessions. Accomplished draughtsmen often use words somewhat tautologically in the effort to embrace every description of personal estate."

As stated in 1 Underhill, Law of Wills, § 308, p. 414: "The testator's personal property will include all his property of which he has absolute control, other than real estate, and of which he has power to dispose. * * * This is the primary sense of the words which they have in a will, unless it is clearly apparent that the testator used them in a restricted sense."

In Farish v. Cook, 78 Mo. 212, 47 Am. R. 107, the court held: "It is a natural presumption that a testator, in making his will, intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption ought to have weight, but it cannot supply the actual intent of the testator to be derived from the language of the will. When the clause to be construed cannot be connected with some other part of the will disclosing such intent, it cannot prevail, nor even where the intent is disclosed, in the absence of language sufficient to carry everything." See, also, Allison v. Hitchcock, 309 Mo. 488, 274 S. W. 798; Goodrich v. Bonham, 142 Neb. 489, 6 N. W. 2d 788.

Also, as stated in Hunter v. Miller, 109 Neb. 219, 190 N. W. 583: "It is further true that there is a presumption that the testator intended to devise all of his prop-

erty, and did not intend to die intestate as to any part of it, but that presumption is not stronger than the other presumption, which is, that a testator will not be held to have disinherited an heir except where that conclusion is impelled by the express provisions or by necessary implication from provisions specifically set forth. Watson v. Martin, 228 Pa. St. 248." Therein the court specifically held: "The presumption that a testator intended to fully cover the disposition of his estate by his will will not overcome the rule requiring express provision, or necessary implication, to disinherit an heir."

Farish v. Cook, *supra,* involved the language "all my worldly goods, consisting of household furniture, clothing, beds and bedding, money and cattle; also whatever debts may be due me; * * *." In that connection the court said in the opinion: "In prefixing it with the words 'all my worldly,' he makes use of a phrase, which if used alone with the word 'goods,' might be reasonably supposed to embrace his lands; and this meaning of the phrase has in some instances been sustained. But the subsequent language indicates by its enumeration, that he did not intend it should include real estate, for he continued, 'consisting of household furniture, clothing, beds and bedding, money and cattle.' He wills her his worldly goods, and tells what they are, thus restricting the meaning to personal property." See, also, Annotation 54 A. L. R. 97.

It will be observed here that the words "both personal and moneys" modified or qualified by enumeration, explanation, and limitation "all my worldly posessions (possessions) * * *." Thus we do not have the question of whether or not the latter words standing alone would devise real estate because they were clearly qualified by subsequent description. Therefore, we conclude that from all of the context, personal estate only was in contemplation of testatrix when the will was executed. To hold otherwise would not give any effect to the qualifying portion of the language used, and would rewrite

the will, which courts have no authority to do.

Further, the word "moneys" was followed by "which I now have may die posessed (possessed) of or may be entitled to." Testatrix doubtless used such words not only as synonymous with "personal" but also to make sure that plaintiffs received such money as she had or possessed, together with that which she would be entitled to in the future, such as that due on the property settlement heretofore described, which was not completed until after her death.

Cases relied upon by plaintiffs are distinguishable. The wills therein either used all-inclusive language without qualification limiting their meaning, or used limited language followed by unlimited all-inclusive qualifications. They are not controlling here. Under the language here employed, the word "personal" does not mean "the property of or pertaining to myself," or "in the sense of own—my own property," or "the property I own personally" as argued by plaintiffs. Here the words "both personal and moneys" qualified "possessions" defining the kind of possessions bequeathed, a word which may include real estate if so intended, although such would not ordinarily be its technical meaning.

It is elementary that real estate not disposed of by will becomes intestate property and descends to the heirs at law of the testatrix. Hunter v. Miller, *supra;* Heilman v. Reitz, 89 Neb. 422, 131 N. W. 909.

For the reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

EARL MAY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
54 N. W. 2d 62

Filed June 6, 1952. No. 33152.

1. Juries. If the voir dire examination of a juror considered as a whole does not show incompetency, a challenge upon that ground is properly overruled, although during his examination statements are made which, if unexplained, might be ground for challenge.
2. Witnesses: The credibility of witnesses and the weight of their testimony are for the jury to determine.
3. Trial. It is not error to refuse requested instructions when the substance of them is given by the court in its instructions to the jury.
4. ———. Generally in the initial instructions it is not necessary to instruct the jurors as to their right to disagree.
5. ———. It is not error to refuse an instruction which has the effect to withdraw from the consideration of the jury competent material evidence in the case.

ERROR to the district court for Adams County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

*J. E. Willits,* for plaintiff in error.

*Clarence S. Beck,* Attorney General, and *Homer L. Kyle,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

The plaintiff in error will hereinafter be referred to as the defendant. By information it was charged that on January 16, 1950, he, with intent to convert the same to his own use, unlawfully stole and took away the sum of $171 from the Home Oil Company in Hastings, Nebraska, which money was the property of said company. He entered a plea of not guilty. Trial was had to a jury resulting in a verdict of guilty and a finding that the amount of the money stolen was $116. A motion for new trial was filed and overruled. Defendant was sen-

tenced to a term in the penitentiary. He brings the cause here by petition in error. We affirm the judgment of the trial court.

In brief summary, the State produced evidence showing that the Home Oil Company operated a gasoline sales and service station in Hastings, Nebraska. It used a cash register for the purpose of handling its cash sales. At 4 p. m. on January 16, 1950, all money except $250 was taken from the cash register. The money left in the cash register consisted of about $50 or $60 in silver and the balance in currency in $1 and $5 denominations in three "packs" held together by paper clips. Additional cash sales were registered and the receipts placed in the money compartment thereafter. The cash register totaled these sales as made and also recorded them on a tape. In the regular course of business, charge sales were not entered on the register.

The business operated in a building consisting of four rooms, the cash register being in one of them and the bookkeeping work being done in another.

About 6:20 p. m., the defendant and two others entered the building and asked permission to use the telephone to call for and did call a cab. The manager was alone in the station. One of the men engaged the manager in conversation in the bookkeeping room, while defendant and the other man were in the room where the cash register was located. They left in about 15 minutes, going eventually to a cafe in another part of the city.

Within minutes after their departure the manager noted that a "charge" sale had been rung up on the cash register. Upon examination it was found that all currency had been removed from the register and was missing. By calculation it was determined that the cash was short $171.10.

The three men were arrested that evening shortly after 8 o'clock. When arrested one of the men had twenty-four $1 bills folded and "with a paper clip" in

his shirt pocket and seven $5 bills in his billfold. Another of the men had fifteen $1 bills in his socks. The defendant had twenty-seven $1 bills and six $5 bills in his billfold.

We determine the appeal under the rule that "* * * consideration of the cause will be limited to errors assigned and discussed." Rule 8 a 2 (4).

The first assignment is that the court erred in overruling challenge for cause made to a prospective juror. On voir dire examination she was asked if she would follow an instruction as to the burden of proof beyond a reasonable doubt. She answered, "I would have to hear the case and hear him testify." Later she said, "I would like to" hear him testify, and, still later, she "would have to hear him testify." The defendant challenged for cause. The court then stated, "* * * the defendant is presumed innocent * * * the defendant does not need to take the witness stand. I do not think the juror understood the question." The defendant stood on his challenge. The court then advised the juror that "The defendant is not required to testify," and asked "If the Court would instruct you that you would have to find beyond a reasonable doubt the defendant was guilty even though the defendant did not testify, would you follow that instruction?" The answer was, "Yes, sir." The objection for cause was overruled. Substantially this same situation arose in Keeler v. State, 73 Neb. 441, 103 N. W. 64, wherein we held: "If the voir dire examination of a juror considered as a whole does not show incompetency, a challenge upon that ground is properly overruled, although during his examination statements are made which, if unexplained, might be ground for challenge." The assignment is without merit.

Defendant's next assignment goes to the admission of evidence over objection.

It appears from the evidence that the cash register had an open window on which appeared the nature and the amount of each sale. It also had a "totalizer" which

registered all the cash sales that had been rung up, and a tape recording of those entries was made by the operation of the register.

A State's witness testified as to the "charge sale" rung up on the register "on this window" and as to checking the total of the cash sales shown on the register plus the change left in the register at 4 p. m., and subtracting from it the amount of money in the register to determine the shortage. To this evidence the defendant objected and here urges that the tape recording was the best evidence. The witness was testifying here to things which he saw and things which he did. He was not testifying that he examined the tape at that time or knew what, if anything, it showed, nor was he testifying with reference to it. We do not find error in this assignment. See Gross v. Scheel, 67 Neb. 223, 93 N. W. 418.

The next assignment is that the court erred in failing to instruct the jury to return a verdict of not quilty. Defendant merely asserts that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt. The credibility of witnesses and the weight of their testimony are for the jury to determine. Smith v. State, 153 Neb. 308, 44 N. W. 2d 497. The assignment is not sustained.

Defendant does not assign error as to the accuracy or sufficiency of any instructions given. He assigns error as to the refusal to give certain instructions.

The rule is: "It is not error to refuse requested instructions when the substance of them is given by the court in its instructions to the jury." Smith v. State, *supra*.

Under this rule the assignment of error as to the refusal to give requested instruction No. 3 is without merit as the substance of the requested instruction is found in instructions Nos. 1, 2, and 11 given by the court. The substance of requested instruction No. 6 is included in instruction No. 5 given by the court. The same is true as to requested instructions Nos. 12 and 13, which are covered by instruction No. 7 given by the court.

Requested instruction No. 11 is a somewhat long discussion of the duties of each juror and concludes with the proposition that the court was giving the jury two forms of verdict—one finding not guilty, one finding guilty, "and a report that an agreement is impossible." The trial court refused to give the instruction. Defendant claims error. The contention here is that the jurors should have been instructed that they had a right to disagree. "* * * it is hardly necessary to instruct an American jury touching their right to disagree, for this is universally understood." State v. Rogers, 56 Kan. 362, 43 P. 256. "* * * as everybody knows, the jury may either convict or acquit or disagree * * *." State v. Wimer, 97 Kan. 353, 155 P. 7. See, also, Wilder v. People, 86 Colo. 35, 278 P. 594, 65 A. L. R. 1260. The assignment is without merit.

The defendant testified as a witness in his own behalf. On direct examination he was asked where he was living at the time and he answered, "County jail." On cross-examination he was asked where he had lived prior to that time, and he answered, "The State Penitentiary * * *." Later he was asked, "* * * have you ever been convicted of a felony?" He answered, "I have or I wouldn't have been in the State Penitentiary." Defendant requested an instruction that "The Jury are instructed that a former conviction of another offense cannot be considered by you as any evidence of the charge contained in the Information filed herein." The trial court refused the instruction. The defendant assigns the refusal to give this instruction as error.

Section 25-1214, R. R. S. 1943, provides: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof."

It is not contended here that the evidence was not competent. A fault of the requested instruction is that it is misleading. In People v. Jacobs, 73 Cal. App. 334, 238 P. 770, the defendant admitted a plea of guilty to

a felony. He requested an instruction that "'* * * in your deliberations on the guilt or innocence of the charges for which he is now on trial, you are to totally disregard such testimony and to confine yourself to just such evidence as has been introduced * * * relative to the crime alleged in the information * * *.'" The court in holding the instruction properly refused said: "It was sought by the proposed instruction to have the court tell the jury that its members were not to consider appellant's plea of guilty to the felony charge in deliberating upon the issue of his guilt or innocence. It is practically certain that this language would have been understood by the jury to mean that the plea of guilty was not to be considered for any purpose. In this respect, then, it was misleading."

The applicable rule is: "It is not error to refuse an instruction which has the effect to withdraw from the consideration of the jury competent material evidence in the case." Chezem v. State, 56 Neb. 496, 76 N. W. 1056.

During the period of its deliberations the jury sent a written communication by the bailiff to the court containing a series of questions, some of which were apparently directed to the State and some to the defendant. The court received the communication, the county attorney, the defendant, and his counsel being present. The court answered in writing that it had no further communications to give and to "Please study the Instructions * * *." The defendant requested that the court add, "The Exhibits and the evidence and the testimony introduced in the trial." The court refused to add the requested words. Defendant assigns the refusal as error. He does not advance any basis for the assignment, save that above recited. The assignment is not argued. Obviously the instructions required that the jury consider the evidence. We see no merit in the assignment.

The judgment of the trial court is affirmed.

AFFIRMED.

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IN RE GUARDIANSHIP OF CLARA M. CASS. CLARA M. CASS, APPELLEE, V. FORREST PENSE ET AL., APPELLANTS.
54 N. W. 2d 68

Filed June 6, 1952. No. 33167.

1. **Appeal and Error.** Appeals in probate matters from the county court to the district court, except from the probate or denial of probate of wills and from the allowance or disallowance of claims filed against an estate, are tried in district court as cases in equity are conducted.
2. ———. Appeals to this court in such matters are heard and determined de novo.
3. **Guardian and Ward.** A proceeding for the appointment of a guardian is in this state a probate matter.
4. ———. The authority to appoint a guardian for an adult person depends upon statute and unless the requisites thereof are shown to exist the court is without power to make an appointment.
5. ———. The examination at the trial of an application for the appointment of a guardian for an adult person should be directed to such inquiries as have for their object the finding and determination of the mental condition of the person alleged to be mentally ill or mentally incompetent.
6. **Insane Persons.** Mentally incompetent as used in section 38-201, R. S. Supp., 1951, means that the mind is so affected as to have lost control of itself to such a degree as to deprive the person affected of sane and normal action.
7. ———. Mental incompetency exists when there is definite privation of reasoning faculties to the extent that the person affected is incapable of understanding and acting with reasonable discretion in the ordinary affairs of life.
8. **Guardian and Ward.** In statutory requisites for the appointment of a guardian for an adult person mentally ill is one cause and mentally incompetent by reason of old age or other cause, to have charge and management of his property, is another.
9. ———. Chapter 38, article 9, R. S. Supp., 1951, providing for the appointment of a conservator is for the benefit of any adult who is not a spendthrift, mentally ill, or mentally incompetent,

but who considers himself unfit by reason of infirmities of age or physical disability to manage his estate.

10. **Infants.** The county court has power to appoint a guardian ad litem to represent an infant who is interested in a matter then pending in that court.

APPEAL from the district court for Hamilton County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

*Charles F. Adams,* for appellants.

*Edgerton & Powell,* for appellee.

*Chas. L. Whitney,* Guardian Ad Litem.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is a proceeding to subject the property and person of Clara M. Cass to guardianship for the reason, as alleged, that she is physically incapable and mentally incompetent to manage her property and care for herself.

The petition for the appointment of a guardian for appellee was made by appellants, nephew and niece respectively, of appellee. It is alleged therein that: Appellee, a resident of Hamilton County and the owner of real and personal property, is 81 years of age, is in ill health mentally and physically, and because thereof is unable to care for herself or to manage her property. The next of kin and heir presumptive of appellee is Aleeta Clare Cass, a granddaughter. Nellie M. Phelps had been, for a year, living in the home of appellee and had been her housekeeper and nurse. Appellants asked that the court appoint Frank M. Farr or some other suitable person as guardian.

Appellee denied the allegations of the petition, alleged she was not an idiot, a lunatic, or mentally incompetent, but by reason of physical disability she deemed herself unfit to manage her estate with prudence and understanding. She asked the court to appoint Maurice Miller,

who had acted as her agent for about five years, as conservator of her estate as permitted by the law of Nebraska.

The county court found that appellee was not an idiot, a lunatic, or insane, but that she was by reason of long-continued, severe ill health and advanced age, mentally and physically incompetent to have charge of her estate and to manage her property, and it was necessary that a guardian be appointed for her person and her estate. The application for the appointment of a conservator was denied and a guardian was appointed.

The district court heard the matter on appeal from the judgment of the county court and found that appellee was feeble of body and physically incapable of managing her estate, but that she was not an idiot, a lunatic, or mentally incompetent, and that a conservator rather than a guardian should be appointed for her estate. The judgment of the county court was reversed and it was directed to appoint Maurice Miller as conservator of the estate of appellee and to require him to furnish bond of $20,000, conditioned as provided by law, subject to the right of that court to change the amount of the bond if and when a future condition justified it. The motion of appellants for a new trial was denied.

The parties disagree as to the manner of the disposition of this appeal in this court. A proceeding for the appointment of a guardian is a probate matter. In re Guardianship of Hergenrother, 141 Neb. 858, 5 N. W. 2d 118. Commencing with August 27, 1949, all appeals in probate matters from the county court to the district court, except appeals from the probate or denial of probate of wills and appeals from the allowance or disallowance of claims filed against an estate, have been triable in district court as suits in equity are conducted, and appeals to this court from the district court in such matters are heard and determined de novo. §§ 25-1105, 25-1925, R. R. S. 1943, § 30-1606, R. S. Supp., 1951; In re Estate of Bergren, 154 Neb. 289, 47 N. W. 2d 582.

It is the duty of this court to determine the facts from the record without regard to the findings and conclusions of the district court.

The record establishes that appellee is a widow 81 years of age and a resident of the city of Aurora. Her husband died in 1945. She had one child, a son. He died and left surviving him one daughter, Aleeta Clare Cass, a minor resident of Kansas. Appellee is the owner in fee of 80 acres of land in Clay County and 240 acres of land in Hamilton County. She has a life estate in 400 acres of land in Hamilton County, the home residence property in Aurora, and a building in the retail business district of Aurora. Her personal property consists of household goods, about $12,000 cash, bank certificates of deposit of about $3,000, checking accounts in two local banks, and a small amount of stock of the banks. The Clay County land has been rented by her to her nephew Forrest Pense. Since the death of her husband she has employed Maurice Miller as her agent and he has managed the other land for her. He has transacted all of the business in reference to that land. He was a tenant and resided on a part of the land at the time of the death of Mr. Cass. There is no evidence that appellee has not been provident in her business matters; that her agent has not been honest, faithful, and efficient; or that she has lost or been deprived of any income to which she was entitled. There is no proof that she has improperly expended any amount of money or encumbered or disposed of any of the property. It is not claimed that she has been taken advantage of in any transaction.

Appellee 4 or 5 years before the trial in district court suffered a cerebral accident referred to in the record as a "stroke." It disabled her and she was cared for in her home. On the 17th day of February 1951, she suffered a second cerebral accident. She was immediately taken to, and has since been confined in, a hospital in Aurora. She is bedfast and is physically incapacitated.

The evidence does not establish that appellee is mentally incompetent but preponderates in support of the conclusion that she is not.

It is not claimed by appellants that appellee is insane. It is only alleged that she is physically and mentally incapable of caring for herself, her property, and business affairs by reason of ill health. The statute contemplates the appointment of a guardian for "any mentally ill person or * * * any person who * * * is mentally incompetent to have the charge and management of his property * * *." § 38-201, R. S. Supp., 1951. The power to appoint a guardian for an adult person depends upon statute and unless the requisites thereof are shown to exist the court cannot act favorably to the appointment. In statutory requisites for the appointment of a guardian for an adult person insanity is one consideration and mental incompetency, by reason of old age or other cause to have the charge and management of property, is another.

It is inevitable that if life is prolonged to old age the advance of the years will be marked by greater or less decrease of bodily powers and mental efficiency. But generally if that course be normal, if it be such only as attends age unaffected by abnormal brain conditions, there will not be mental incompetency within the meaning of the law and nothing to justify a court in depriving a person involuntarily of the control of his property. The purpose of a guardianship of this kind has reference to the preservation of the property of the ward and any assistance he may personally require. The mere fact that he manifests the weakness, forgetfulness, and normal characteristics of age is quite immaterial unless his debility has reached the stage where he cannot manage or intelligently direct the management of his affairs and his estate is liable to suffer material loss or waste for want of a responsible person in charge.

A guardian should not be appointed either of the person or property of an adult simply because he is

aged or infirm or because his mind is to some extent impaired by age or disease. On the other hand the object of the statute under which this proceeding is brought is primarily the protection of property and if one does not possess sufficient mentality to understand in a reasonable manner the business he is transacting, or the nature and effect of his acts with reference to business affairs, or if he has lost his reasoning powers to such an extent that he is incapable of understanding or acting with ordinary discretion in common affairs and his property has thus become subject to loss or waste, then a guardian should be appointed to manage his affairs. The term mentally incompetent as used in the statute does not refer to a person who is sane but not as wise, intelligent, or mentally strong as some other person. It applies to the person whose mind is so affected as to have lost control of itself to such a degree as to deprive the person affected of sane and normal action. Obviously no general rule can be stated on this subject. Each case must be determined upon its particular facts. Keiser v. Keiser, 113 Neb. 645, 204 N. W. 394; In re Guardianship of Blochowitz, 135 Neb. 163, 280 N. W. 438; In re Johnson's Estate, 286 Mich. 213, 281 N. W. 597; In re Guardianship of Warner, 232 Wis. 467, 287 N. W. 803; In re Guardianship of Olson, 236 Wis. 301, 295 N. W. 24; Annotations, 17 A. L. R. 1065, 113 A. L. R. 354; 25 Am. Jur., Guardian and Ward, § 19, p. 19. The evidence is insufficient to show that appellee was mentally incompetent to have charge and management of her property, and the district court properly refused to subject her property and person to guardianship.

Prior to the intervention of the Legislature in 1947 a guardian for an adult person, not a veteran, could only be appointed if he was a spendthrift, insane, or mentally incompetent to have the charge and management of his property. If he was incapacitated by the infirmities of years or physical disability the court had

no jurisdiction on his application or otherwise to preserve or protect his estate. The act of 1947 is for the benefit of the adult who is not a spendthrift, insane, or mentally incompetent but who considers "himself unfit by reason of infirmities of age or physical disability to manage his estate * * *." He may apply to the court for a conservator and the court may appoint a suitable person or a qualified corporation as conservator of his estate. C. 38, a. 9, R. S. Supp., 1951. In 25 Am. Jur., Guardian and Ward, § 21, p. 20, it is said: "In several states statutes authorize a person who, although of sound mind, believes he is incapable of managing his own estate or of caring for his own property to apply for, request, or consent to the appointment of a conservator of his estate, who, when appointed, possesses over the estate substantially the same powers and is subject in regard thereto to substantially the same duties as a guardian of an incompetent. It is said that an application for the appointment of a conservator of the petitioner's estate is only a voluntary application for a guardian with limited powers, dignified under the law by another name * * *." See, also, Hogan's Appeal, 135 Me. 249, 194 A. 854, 113 A. L. R. 350.

The fact that appellee was not mentally incompetent to have the charge and management of her property, that she made application for the appointment of a conservator of her estate as the statute permits, and the incidence of her physical incapacity entitled her to the benefit of the statute. It is not shown that Maurice Miller was disqualified or unsuitable to be conservator of the estate of appellee and he was properly selected to perform the trust.

Appellee by cross-appeal contests the authority of the county court to appoint and the power of the district court to continue the services of a guardian ad litem for Aleeta Clare Cass, a minor, the granddaughter and sole heir presumptive of appellee, and the right of the district court to assess compensation for the services

of the guardian ad litem against the estate of appellee. The granddaugter was named in the petition and it asked that the court cause notice to be given to her of the pendency of the proceeding and of the date of the hearing. This was done.

The county court appointed Chas. L. Whitney, Jr., as guardian ad litem for Aleeta Clare Cass. She by pleading in the district court set forth that she was about 18 years of age; that her interest and welfare in the matters involved in the proceeding were identical with that of her grandmother, the appellee; that she desired F. E. Edgerton, the attorney for her grandmother and her attorney, to appear and act for her in the pending matter; and she asked that the court show on the record of the case that she was represented by Mr. Edgerton and not by Mr. Whitney. Her pleading was, on motion of appellants, stricken from the record because the court found that the interest of Aleeta Clare Cass might conflict with the interest of appellee who was represented by Mr. Edgerton; that it would be improper for him to appear for the granddaughter "in this case because of said conflict of interests"; that the appointment of Chas. L. Whitney, Jr., as guardian ad litem by the county court was proper in all respects; and that he should be and was retained and continued as guardian ad litem for the granddaughter. The district court allowed $60 as compensation for the services of the guardian ad litem in the county court and district court and ordered it be paid by the conservator, upon his qualification, from the estate of appellee.

The position of appellee is that the statutes regulating practice in the probate court do not require the appointment of a guardian ad litem for a minor interested in a matter pending in that court; that the granddaughter had no legal interest in this matter; that she had not been impleaded therein; that the appointment and continuance of a guardian ad litem for her were improper and without authority of law; and that in any event

she had a right to be represented, if she had a legal interest in the matter in controversy, by the attorney of her choice and designation as her next friend. The granddaughter is the nearest relative and heir presumptive of appellee and she therefore has a legal interest in appellee and her estate. § 38-201, R. S. Supp., 1951. In Tierney v. Tierney, 81 Neb. 193, 115 N. W. 764, the court said: "The legislature has expressly declared the next of kin and the heirs apparent or presumptive to have an interest in the estate of an incompetent person. It is very apparent that the next of kin have as great an interest in the property and estate of an incompetent person before he has been declared such as they have thereafter. While the interest of heirs apparent is not vested, yet their right to protect the same is a present and existing one. * * * It is the policy of our law that the heirs apparent or presumptive and those dependent upon an incompetent person have an interest in him and in his property, and that they are proper parties to any proceedings affecting him or his property." See, also, Prante v. Lompe, 77 Neb. 377, 109 N. W. 496; Hall v. Hall, 123 Neb. 280, 242 N. W. 607.

The practice in this state intends that a minor interested in a matter in litigation may and generally should be represented by a guardian ad litem or a next friend. §§ 25-307, 25-309, 30-1603, R. R. S. 1943, § 38-114, R. S. 1943. The distinctions between the functions of a guardian ad litem and of a next friend have all but been completely removed by the development in procedure. See Schade v. Connor, 84 Neb. 51, 120 N. W. 1012. The right of the probate court to appoint a guardian ad litem to represent the minor granddaughter seems to be recognized and within the contemplation of the statute. § 38-114, R. S. 1943. The statute providing for appeals in matters of probate jurisdiction lends support to this view because it provides that "Every party so appealing shall give bond * * *. But an executor, administrator, guardian or guardian ad litem shall not be re-

quired to enter into bond * * *." § 30-1603, R. R. S. 1943. This section is applicable to and controls an appeal in proceedings for the appointment of a guardian. In re Guardianship of Hergenrother, *supra*.

The findings of the district court are adopted and made the findings of this court in this case. The compensation of Chas. L. Whitney, Jr., as guardian ad litem for services in this matter in all courts (including the $60 allowed by the district court), should be and is fixed at the sum of $250, and shall be paid by the conservator from the estate of appellee. The judgment of the district court should be and it is affirmed.

AFFIRMED.

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CHARLES W. PETERSON, APPELLANT, V. J. ED. HANCOCK, COUNTY TREASURER OF HOLT COUNTY, NEBRASKA, APPELLEE.

54 N. W. 2d 85

Filed June 6, 1952. No. 33172.

1. **Constitutional Law: Statutes.** Chapter 250, Laws of Nebraska, 1949, page 680, appearing as sections 79-438.01 to 79-438.07, R. R. S. 1943, is not unconstitutional for defect of title in violation of Article III, section 14, Constitution of Nebraska.
2. ———: ———. However, sections 4 and 5 of the act, now appearing as sections 79-438.04 and 79-438.05, R. R. S. 1943, are unconstitutional as in violation of Article VIII, section 1, and Article VIII, section 4, Constitution of Nebraska.
3. ———: ———. Since the remainder of the act is so connected with the aforesaid invalid portions that it cannot be upheld without doing violence to the legislative intent as a whole, the entire act must fall as unconstitutional.

APPEAL from the district court for Holt County: DAYTON R. MOUNTS, JUDGE. *Reversed and remanded with directions.*

*Davis, Stubbs & Healey, Julius D. Cronin,* and *Harlan A. Bryant,* for appellant.

*Clarence S. Beck,* Attorney General, and *William T. Gleeson,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, a resident, real-property owner, and taxpayer of Class I elementary school district No. 231, having an enrollment of less than five pupils, in Holt County, Nebraska, brought this action for himself and all others similarly situated, against defendant county treasurer, to have chapter 250, Laws of Nebraska, 1949, page 680, known as the Blanket Mill Tax Levy Act, now designated as sections 79-438.01 to 79-438.07, inclusive, R. R. S. 1943, declared unconstitutional and void; to enjoin the levying, assessing, collecting, or attempting to collect any part or all of the taxes purportedly authorized thereby; and for equitable relief. Defendant answered, admitting that plaintiff was a resident, real-property owner, and taxpayer as alleged, denying unconstitutionality of the act, and alleging that unless restrained he intended to perform his duties required thereby. He prayed for a declaration of constitutionality and for equitable relief.

After a hearing whereat evidence was adduced, the trial court rendered its decree, finding and adjudging the issues generally against plaintiff and in favor of defendant. Plaintiff's motion for new trial was overruled, and he appealed, assigning that the trial court erred in declaring the act constitutional. We sustain the assignment.

For clarity and brevity, the Blanket Mill Tax Levy Act will be hereinafter referred to as the act, and in discussing its provisions we will refer to the sections as they appear in chapter 250, Laws of Nebraska, 1949, page 680.

The pertinent facts are not in dispute. School district No. 231 in which plaintiff's property is located has

fewer than five pupils enrolled for the school year 1951-1952. For the 1950-1951 school year there were 31 elementary school districts in Holt County having fewer than five pupils, all of which operated and maintained their own schools, and 10 other such districts had no pupils. During the year 1951-1952 there were 22 such schools having fewer than five pupils and 16 of them operated and maintained their own schools.

On August 6, 1951, plaintiff tendered and offered to pay defendant, who refused to accept, the amount of all taxes levied against his property for all purposes, including all school district levies except the amount of a four-mill levy made under purported authority of section 2 of the act. Admittedly plaintiff's property was assessed for tax purposes at a valuation of $235,995 for 1950, and on August 3, 1950, there was levied thereon, concurrently with other lawful levies, a tax in the amount of four mills, and the amount of the tax to be derived as a consequence of such imposition upon plaintiff's property was $934.98.

No part of district No. 231 is separated from other elementary school districts by streams of water or other natural barriers, nor would any children presently residing therein be required to travel in excess of four miles over unsurfaced roads to the next school, so that such district does not come within the provisions of section 6 of the act.

On June 11, 1951, district No. 231 had $7.09 cash on hand. On said date there was in the hands of the county treasurer $848.89 belonging to such district, and there was $723 representing other outstanding and unpaid taxes for school purposes for said district. On that date the school board and electors at the annual meeting adopted a budget of $1,718.50 needed for operating expenses during the 1951-1952 school year, which amount was duly certified to the county clerk, and thereafter the county board of equalization levied a tax upon all property in the district of 3.8 mills for school purposes

upon an assessed valuation of $521,635, which, if all collected, would produce $1,982.21.

Thereafter on or about July 1, 1951, for "the first year" during which "no district shall lose its blanket tax" as provided in section 4 of the act, the district received back $633.25 from the county treasurer, same being the distribution to it from the 1950 blanket mill tax school levy of four mills made in Holt County by the county board of equalization. Such levy for 1951 was also four mills, no part of which was or could be distributed back to the district or others of like character because, as provided by section 4 of the act, in order to be eligible therefor: "After the first year" it "must have had an enrollment of five or more students for the school year immediately preceding this levy." Such sums went into a general fund and were apportioned to other eligible districts in the county, including two high school districts as provided by sections 4 and 5 of the act. The State Superintendent of Public Instruction furnished forms to all county superintendents to be used by them for the computation, allocation, and distribution of money from the blanket mill tax levy, and to carry out the provisions of the act, as provided therein.

After defining blanket tax levy as a minimum tax levy on all elementary school districts within a county, as more particularly set forth in section 2, and defining merging of districts, the act provides:

"Sec. 2. A blanket mill levy tax sufficient to raise two-thirds of the cost of operating the elementary school districts of a county shall be levied upon the actual value of all the taxable property in the elementary school districts of a county, except intangible property. The amount of this levy shall be determined by the county treasurer from figures based on the previous year's expenditures of the elementary school districts of the county, but in no instances shall this blanket tax levy exceed four mills.

"Sec. 3. The returns from this levy shall be paid by the county treasurer on an order from the county superintendent to those districts that are eligible to receive these funds as provided in section 5 of this act.

"Sec. 4. After the first year, to be eligible to receive these funds a district must have had an enrollment of five or more students for the school year immediately preceding this levy. During the first year no district shall lose its blanket tax because of this provision. Nothing in this section shall prohibit a high school district from participating in such funds if it shall be eligible under the provisions of section 5 of this act nor a district which qualifies under section 6 of this act.

"Sec. 5. The funds raised by the blanket mill levy tax shall be distributed as follows: (1) The entire amount of the blanket tax collected on taxable property within a district shall be refunded to those districts that maintain school and have a total of five or more pupils enrolled; Provided, if the district does not require the total blanket tax, it shall receive only that portion needed; (2) those schools which contract for instruction of pupils shall receive an amount required for carrying out such contract and transportation of pupils, but in no case more than the blanket tax raised in such school district; (3) two-thirds of the remainder of the amount raised, after the payments required by subdivisions (1) and (2) of this section, shall be distributed equally to those districts that have an average daily attendance of five or more for the school year immediately preceding; and (4) one-third of the remainder, after the payments required by subdivisions (1) and (2) of this section, shall be apportioned to the eligible districts on the basis of their average daily attendance; Provided, that no district shall receive more funds under subdivisions (3) and (4) of this section than is required for school purposes. If a high school district shall contract for elementary pupils, it shall qualify as a unit for distribution under subdivisions (3) and (4) of

this section the same as an elementary school district if five or more such pupils are taught in said high school district under contract with an elementary district or districts.

"Sec. 6. When streams of water, other natural barriers, or extreme distances that pupils are required to travel make the merger of school districts impractical, those districts having an enrollment of five or less shall become eligible for payment under subdivision (1) of section 5 of this act where an application is made to and approved by the county superintendent. The term extreme distances, as referred to in this section, shall mean that any of the pupils of that district would be required to travel in excess of four miles over unsurfaced roads to the nearest school."

We are not here particularly concerned with the first year of operation since this action necessarily involves only the levy and payment of the second year and subsequent levies, which are distributed on an entirely different basis. By simple computation it will be observed that a four-mill levy on an assessed valuation of $521,635 upon the property in district No. 231 will raise a fund of $2,086.54, an amount to be paid by the taxpayers therein, including plaintiff, over and above their own lesser regular 3.8 mill levy for the maintenance and operation of their school, and under the provisions of the act none of such larger amount will be returned to the district. Rather, all of it, a sum considerably in excess of the amount required to maintain and operate their own school, will be distributed to other elementary and high school districts solely for their respective local purposes, and thus proportionately reduce their regular school district levy.

At the outset plaintiff argued that the act was unconstitutional as in violation of Article III, section 14, Constitution of Nebraska, which provides in part: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall

be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

Plaintiff first predicated his argument upon the contention that the title is fatally defective in that it failed to disclose that school districts having fewer than five pupils could not participate in distribution of the proceeds of the tax; and second, that the act is amendatory of preexisting laws without reference thereto. We conclude that the contentions have no merit.

To restate the long title herein would serve no purpose. It is sufficient for us to say that it appears therefrom that the act has but one general subject or object, to wit: the levy of a blanket mill tax for the support of certain elementary school districts in the county, and the title expressly gives notice that it contains provisions prescribing a method of distribution thereof.

In Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N. W. 2d 174, this court held: "Where a bill has but one general object, no matter how comprehensive that object may be, and contains no matters not germane thereto, and the title clearly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution.

"Article III, section 14, of the Constitution, does not require that the title to an act shall be a complete abstract of the bill. If the act contains but one subject and that subject is clearly expressed in the title, the constitutional requirements have been met, even though the title contains duplicitous or extraneous provisions not necessary to its validity."

In Affholder v. State, 51 Neb. 91, 70 N. W. 544, it is said: "But this constitutional provision should be liberally construed, and so construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title; and to admit all provisions

which are germane, and not foreign, to the purposes of the act as expressed in its title." See, also, Van Horn v. State, 46 Neb. 62, 64 N. W. 365.

The case of Wayne County v. Steele, 121 Neb. 438, 237 N. W. 288, relied upon by plaintiff, is clearly distinguishable and not controlling. Therein it was concluded, under circumstances not comparable with those at bar, that the title "wholly silent as to penalties" was plainly not comprehensive enough to authorize the penalty provisions of a simple nepotism act.

With regard to plaintiff's second defective title contention, he argued that the act changed and amended sections 79-431 and 79-432, R. R. S. 1943, making an intelligent levy impossible. We conclude otherwise.

Section 79-431, R. R. S. 1943, provides that the school board shall, prior to the annual meeting in each year, prepare an estimate showing the amount of money required for maintenance of the school in the manner provided by law during the coming school year. Section 79-432, R. R. S. 1943, simply relates to limitations of the levy for school purposes.

In Union Pacific R. R. Co. v. Troupe, 99 Neb. 73, 155 N. W. 230, this court held: "When a school district has money in its treasury available for the support of the school during the ensuing school year, it is bound to take that fact into account in fixing the tax levy, and the levy should be made for no more than will approximately raise the difference between the amount on hand and the amount determined as necessary to meet the expenses of the district for the ensuing school year."

In that connection the act here involved simply provides certain school districts with another source of income which must be taken into account in making their estimate, which, with aid of the county superintendent, can be done as intelligently as it would be to take into account any money left in its treasury from the previous year.

In any event, the rule in this jurisdiction is: "Where

an act is passed as original and independent legislation and is complete in itself so far as applies to the subject matter properly embraced within its title, the constitutional provision respecting the manner of amendment and repeal of former statutes has no application." Stewart v. Barton, 91 Neb. 96, 135 N. W. 381. See, also, Scott v. Dohrse, 130 Neb. 847, 266 N. W. 709; State ex rel. Beal v. Bauman, 126 Neb. 566, 254 N. W. 256; State ex rel. City of Columbus v. Price, 127 Neb. 132, 254 N. W. 889; State ex rel. Kaspar v. Lehmkuhl, 127 Neb. 812, 257 N. W. 229. In Live Stock Nat. Bank v. Jackson, 137 Neb. 161, 288 N. W. 515, it is said: "The modern rule is: 'Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof.' 1 Lewis' Sutherland, Statutory Construction (2d ed.) 446, sec. 239." Such rules are controlling here.

In Board of Education v. Moses, 51 Neb. 288, 70 N. W. 946, relied upon by plaintiff, the act was not complete but clearly amendatory only. It is therefore distinguishable from the case at bar.

On the other hand, we do conclude that the act is unconstitutional for other reasons hereinafter discussed. In doing so, we have not been unmindful of the statement appearing in Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729, that: "We quite agree that, in construing an act of the legislature, all reasonable doubt must be resolved in favor of constitutionality. Likewise, it has been held that, if a statute is subject to more than one construction, one of which would make the act constitutional and the other unconstitutional, this court is required to adopt the former. Hinman v. Temple, 133 Neb. 268, 274 N. W. 605; Abie State Bank v. Weaver, 119 Neb. 153, 227 N. W. 922." We have also observed the rule that: "The court in considering the meaning of a statute should if possible discover the

legislative intent from the language of the act and give it effect." Armstrong v. Board of Supervisors, 153 Neb. 858, 46 N. W. 2d 602.

Article VII, section 6, Constitution of Nebraska, provides: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." However, such provision is not self-executing and in enacting legislation thereunder the Legislature is of course restrained by other related limitations of the Constitution. State ex rel. Shineman v. Board of Education, 152 Neb. 644, 42 N. W. 2d 168; State ex rel. Caldwell v. Peterson, 153 Neb. 402, 45 N. W. 2d 122.

In that connection, Article VIII, section 1, Constitution of Nebraska, provides: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property." Article VIII, section 4, Constitution of Nebraska, also provides: "The Legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

The act here involved, when considered in pari materia with other related statutes as must be done, deals with both the county and all school districts therein. They are two well-recognized separate governmental subdivisions of the state. The county was not made a school district. It was only a taxing unit for elementary school districts therein, which remained intact as such districts, which, "once lawfully established retain their character and territorial integrity until such time as

they shall be divided, changed or modified in some manner authorized by law." Whelen v. Cassidy, 64 Neb. 503, 90 N. W. 229.

The act contemplates and provides for the levy of two separately characterized taxes for the same purpose. One is the blanket mill levy upon the actual value of all tangible taxable property in the elementary school districts in the county sufficient to raise two-thirds of the cost of maintaining and operating such districts, to be determined by the county treasurer based upon the previous year's expenditures, but not to exceed four mills. The other is the regular maintenance of school levy to be made in each district upon all taxable property of such district, determinable in the light of the money then on hand and the proportionate share, if any, distributable to them of the blanket levy on all districts in the county.

In that connection, section 4 of the act provides that an elementary district, although subject to both taxes "must have had an enrollment of five or more students for the school year immediately preceding this levy" in order "to be eligible to receive these funds * * *." On the other hand, as provided by section 5, "The entire amount of the blanket tax collected * * * within a district shall be refunded to those districts that maintain school and have a total of five or more pupils enrolled; * * *" provided, that, "if the district does not require the total blanket tax, it shall receive only that portion needed; * * *." Of the balance remaining, schools which contract for instruction of pupils shall receive the amount of the contract and transportation. However, in the light of section 79-486, R. R. S. 1943, which provides that: "School districts, thus providing instruction for their children in neighboring districts, shall be considered as maintaining a school as required by law," and the blanket restriction of sections 4 and 5 of the act, only school districts having five of more pupils could in any event so participate in the blanket levy fund.

The balance of such fund is then distributed among all districts having an average attendance of five or more pupils. Two-thirds of it is divided equally among all such districts and the other one-third is "apportioned to the eligible districts on the basis of their average daily attendance; * * *." The latter distribution is even made to high school districts which teach five or more pupils, "under contract with an elementary district or districts." It appears then that such high school districts offer no benefits to any of the other elementary school districts except by contract already paid for by them.

The only conclusion that can logically be drawn is that districts having less than five pupils are required to pay the blanket levy on all their property into the fund for the sole benefit of districts with five or more pupils. As a result, the regular school district taxes in such districts are thereby released, discharged, or commuted at the expense of districts having less than five pupils, who are required not only to pay the blanket tax levy in full to others without any benefit to them, but also to pay all regular school taxes required to maintain the school in their own respective districts.

There is no standard provided in the act whereby districts having less than five pupils can voluntarily qualify for any distribution of the fund to them for which they are taxed. Concededly, the laudable intention of the Legislature by the enactment was by taxation processes to induce elementary school districts having less than five pupils to merge with neighboring school districts by consolidation or reorganization, and thus bring about proficiency and general school economy based upon a broader and greater tax base.

In that connection defendant argued that districts having less than five pupils could escape the alleged unconstitutionality of such taxes imposed upon them by

perfecting a merger or consolidation. However, if such contention had merit, a question which we do not decide, it has no application here because there are jurisdictional procedures which preclude such ipso facto voluntary action by any one district without the electoral consent of other districts concerned.

In that regard, section 79-402, R. R. S. 1943, provides: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected." Further, the creation of a new district is subject to the limitations of section 79-405, R. R. S. 1943, and subsequent related sections. Sections 79-426.01 to 79-426.18, inclusive, R. R. S. 1943, also provide for the reorganization of school districts. Section 79-426.02, R. R. S. 1943, provides for: "(1) The creation of new districts; (2) the uniting of one or more established districts; (3) the subdivision of one or more established districts; (4) the transfer and attachment to any established district of a part of the territory of one or more districts; and (5) the dissolution or disorganization of any established district for any of the reasons specified by law." Related subsequent sections then provide for the creation of state and county committees for reorganization, who shall perfect and recommend plans therefor, whereupon as provided by section 79-426.15, R. R. S. 1943: "* * * the proposition of adoption or rejection of the proposed plan of reorganization shall be submitted at a special election to all the electors of districts within the county whose boundaries are in any manner changed by the plan * * *" and "Approval of the plan shall require a majority of all electors within each voting unit voting on the proposed plan."

As we view it, the blanket mill levy tax is also discriminatory as one levied upon one district of the county for the exclusive benefit and local purpose of other

districts and that it is not levied uniformly and proportionately.

City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771, relied upon by defendant, is distinguishable upon the facts and applicable law. In that opinion it is said: "It is true that inequality of tax assessments vitiates an act of the legislature, but inequality of distribution of the proceeds does not, provided the purpose be for the *public welfare of the whole taxing district.*" (Italics supplied.)

In the afore-cited case, four municipalities asked for an accounting and payment to each of taxes previously collected on property within their borders under a county road tax levy expended and to be expended for the specific purpose of improving all the county roads, which benefited all of the taxpayers of the county, including those within the municipalities. Clearly the purpose there was for the public welfare of the whole taxing district, and we sustained an act providing that all funds derived therefrom should belong to the county as a county road fund for the benefit of all the county roads, which are used by every taxpayer of such a district. Here there results not only an inequality of tax levies but also the school districts having less than five pupils receive no benefit from the blanket tax levy.

In State ex rel. City of Omaha v. Board of County Commissioners, 109 Neb. 35, 189 N. W. 639, this court sustained the constitutionality of an act requiring the county to furnish rooms in the courthouse for municipal courts of any city in which is located the county seat of that particular county. In doing so, the court said: "The revenues of the county do not become the property of the county in the sense of private ownership, and the legislature has authority to prescribe the division and apportionment of money, raised by county taxation, between the county and a city within its limits. 37 Cyc. 1589. It is true that the legislature could not divert funds raised by one district to the use of another dis-

trict (Board of Commissioners v. Lucas, supra), since a tax levied for a public purpose must also be levied for the use of the district which is taxed. Should the legislature order that money be raised by one district and paid to another district, to be used for the sole benefit of that other district, that would be an exaction of money for the benefit of others than those who are taxed and clearly beyond what could be justified as taxation. 26 R. C. L. 72, sec. 51. * * * This is not a diversion of funds or property of the county to the use of persons who have not contributed by taxation to those funds. A large part of the contributions from which the courthouse was built was furnished by the city of Omaha. It is simply an apportionment of the use for general benefits and a direction as to how the property, procured by those funds, shall be used to the interest and benefit of the taxpayers in that particular taxing district." Such statement clearly defines a yardstick upon which constitutionality may be predicated. It is likewise distinguishable from the case at bar. Such case is cited in 61 C. J., Taxation, § 2235, p. 1522, to support the statement that: "It is a sound principle of taxation which prescribes that the benefits of taxation should be directly received by those directly concerned in bearing the burdens of taxation, so that a legislature cannot divert taxes raised by one taxing district to the sole use and benefit of another district." See, also, 61 C. J., Taxation, § 67, p. 136.

State v. Delaware Iron Co., 160 Minn. 382, 200 N. W. 475, involved constitutionality of a statute providing for a comparable county school tax levy, which tax and the proceeds thereof were apportioned "among the school districts of the county on the basis of their respective school enrollments during the school year last preceding." In the opinion it is said: "Appellants further contend that this act taxes one locality for the sole benefit of another and is void for that reason. We may concede that an act taxing one county for the sole benefit

of another, or one school district for the sole benefit of another, could not be sustained, but this is not such a statute. This statute makes the county a taxing unit for the support, in part, of the schools within it. The money produced by the county tax is to be apportioned to the school districts of the county on the basis of their respective school enrollments. Each district receives its proportionate part. The county tax contributes to the support of only those schools which are maintained for the benefit of the people of the county. That the legislature has power to impose such a tax has been settled too long and too firmly to require argument." A fortiori, after the first year the act involved in the case at bar taxes certain school districts for the sole benefit of others, and does not proportionately contribute to all of those schools which are maintained for the benefit of the people of the county.

The over-all general rule is stated in 1 Cooley, Taxation (4th ed.), § 314, p. 653, as follows: "A state purpose must be accomplished by state taxation, a county purpose by county taxation, and a public purpose for any inferior district by taxation of such district. This is not only just but it is essential. To any extent that one man is compelled to pay in order to relieve others of a public burden properly resting upon them, his property is taken for private purposes, as plainly and as palpably as it would be if appropriated to the payment of the debts or the discharge of obligations which the person thus relieved by his payments might owe to private parties. 'By taxation,' it is said in a leading case, 'is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest. An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of certain sums by one portion or

class of people to another.' This principle has met with universal acceptance and approval because it is as sound in morals as it is in law."

Also, as stated in 1 Cooley, Taxation (4th ed.), § 316, p. 663: "A state cannot tax itself for the benefit of the people of another state. So the imposing a tax on one municipality or part of the state, for the purpose of benefiting another municipality or part, violates the rule as to uniformity. No taxing district can be taxed for the exclusive benefit of another district."

Further, as stated in 1 Cooley, Taxation (4th ed.), § 314, p. 650: "In order to give validity to any demand made by the state upon its people under the name of a tax, it is essential not only that the purpose to be accomplished thereby shall be public in its nature, but it is equally essential, that the purpose shall be one which in an especial and peculiar manner pertains to the district within which it is proposed that the contribution called for shall be collected, and which concerns the people of that district more particularly than it does others."

In Morford v. Unger, 8 Iowa 82, it is said: "If there be such a flagrant and palpable departure from equity, in the burden imposed; if it be imposed for the benefit of others, or for purposes in which those objecting have no interest, and are, therefore, not bound to contribute, it is no matter in what form the power is exercised—whether in the unequal levy of the tax, or in the regulation of the boundaries of the local government, which results in subjecting the party unjustly to local taxes, it must be regarded as coming within the prohibition of the constitution designed to protect private rights against aggression, however made, and whether under the color of recognized power or not."

In Bromley v. Reynolds, 2 Utah 525, a regular school tax was levied on all property in the district, including railroad property. Section 19 of the act, relating to school district taxes, provided that any amount of any

such taxes paid by a railroad should be paid to the county treasurer and by him distributed to the several school districts in the county upon the order of the county superintendent, according to the school population. Thus, a part of the school district tax levied on railroad property therein was distributed to other districts. In that regard, the court said: "To carry out the provisions of section 19 the inhabitants of Echo school district must be assessed a larger amount for the reason that a part of the funds so raised is to be diverted to the use of other districts, and to that extent relieves the burdens upon the inhabitants of those districts. Either this increased taxation must be the result, or the individual patrons of the school in Echo district would be required to pay larger tuition fees to meet the ordinary expenses of the district, and in either case the provision is obnoxious to all the objections against appropriating of private property for private purposes, which can exist in any other case." See, also, State ex rel. Ahern v. Walsh, 31 Neb. 469, 48 N. W. 263, a comparable case.

In Board of Education v. Haworth, 274 Ill. 538, 113 N. E. 939, it is said: "The effect of the act of 1915 is to require the tax-payers in a district maintaining a high school to indirectly contribute to the tuition of persons residing in districts maintaining no such school, and thereby to contribute to the local and corporate purpose of furnishing an education to the children of such district. The tax-payers of the district maintaining a high school pay to make up the State school fund and then are deprived of a portion of it for the benefit of districts not maintaining any high school; and the same is true of a district not maintaining a high school which does not send any of its pupils to a high school in another district. The tax-payers of a high school district offering the advantages of a high school education are indirectly forced to assist in the education of pupils living in other districts. The act violates the fundamental

principle of uniformity and equality in taxation and contravenes section 1 of article 9 of the constitution."

High School District v. Lancaster County, 60 Neb. 147, 82 N. W. 380, 83 Am. S. R. 525, 49 L. R. A. 343, declared an act invalid which provided that students from a district without a high school should be admitted to any high school district in the county upon payment of 75 cents a week to the receiving district by the district from which the pupil came. The act was challenged upon the ground that such arbitrary payment would violate the rule of uniformity and result in commutation. In the opinion it was said: "We quite agree with counsel for plaintiff that, under this act, the county is the proper unit of taxation; but we have already shown that, in the event the cost of tuition should exceed or fall below the amount provided by section 3 of the act to be raised by taxing the property of the whole county, it would indirectly violate the rule of uniformity prescribed in section 6 of the article of the constitution named. It would also violate section 4 of said article, as an advantage would accrue to the taxpayers resident in the one or the other of the two portions of the county affected thereby, and it would clearly be a commutation of the taxes to be paid by the taxpayers resident in the one or the other of the two localities. It may be true that such commutation would be brought about indirectly, that is, in case the cost of tuition exceeded the amount provided to be paid by the general tax upon the whole county, the taxpayers resident within the school district would be compelled to supply the deficiency by another levy upon the property within such district, whence it would follow that the difference would be a commutation in favor of those portions of the county outside the district; or, in case the cost of tuition should fall below the specified amount, the taxpayers within the limits of the district would profit at the expense of those without its limits; and it is clear that in either event a commutation of taxes would re-

sult." In such case this court also specifically held that: "The constitution of this state requires not only that the valuation of property for taxation, but the rate as well, shall be uniform." See, also, Smith v. Barnard, 142 Or. 567, 21 P. 2d 204, citing High School District v. Lancaster County, *supra,* as supporting authority. The court therein said: "Since the taxpayers in districts 4, 45, 69, and 19 must pay the special tax under this law, as do all taxpayers in non-high school districts, and must also, by reason of the arbitrary basis of distribution as provided in section 35-4004, pay whatever is necessary to make up the deficiency, the practical effect of the law is to contravene the constitutional provision of this state relative to uniform taxation. * * * Dallas v. Love (Tex. Civ. App.), 23 S. W. (2d) 431, is squarely in point. In that case a statute was under consideration which required a school district to accept a non-resident pupil for instruction at a tuition less than the actual per capita cost of such instruction. It was held that the law was unconstitutional on the ground that it permitted unequal taxation and deprived the district receiving such pupil of due process of law. We note therein this significant language which we think is applicable to the case at bar:

" 'We do not believe, however, that it was ever, even remotely contemplated by the makers of our Constitution that, however essential a general diffusion of knowledge is to the preservation of liberties and rights, this essential purpose should be accomplished in disregard of other, equally sacred, provisions of the Constitution.' "

Wilkinson v. Lord, 85 Neb. 136, 122 N. W. 699, 24 L. R. A. N. S. 1104, never receded from the basic principles with regard to uniformity and commutation set forth in High School District v. Lancaster County, *supra.* It simply arrived at a different conclusion for want of pleading and proof that the tuition to be paid would fall below or exceed the expense of educating such a pupil.

Thereafter, Peterson v. Anderson, 100 Neb. 149, 158 N. W. 1055, involved an act which established a county

high school district with power to establish a high school and levy a tax for its maintenance upon all property in the county not in a district already having a high school. Obviously, all residents and property owners in the districts taxed had a right to send their children to such a high school, and they were therefrom benefited as directly as the residents of an elementary school district who may send their children to the elementary school. The basic law was therefore held valid, but it was pointed out that the law permitted free tuition to any pupil in the county and that some districts were excluded from the payment of tax to the county high school district, which was clearly invalid because it provided benefits for a district in which the property bore no part of the burden of taxation for the support of the county high school. The opinion, citing High School District v. Lancaster County, *supra,* said: "With respect to the provision for free tuition of all pupils in the county, we are satisfied this provision cannot be enforced so far as it applies to pupils residing in districts which bear no part of the burden of taxation for the support of the county high school."

In City Trust Co. v. Douglas County, 101 Neb. 792, 165 N. W. 155, this court construed Article VIII, section 1, Constitution of Nebraska, as inhibiting "the legislature from discrimination between taxpayers in any manner whatever."

In Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317, this court held that: "The legislature does not have the power to release or discharge a tax, such action being prohibited by section 4, art. VIII of the Constitution." Further, "Neither may the legislature circumvent an express provision of the Constitution by doing indirectly what it may not do directly." The opinion, quoting from County of Lancaster v. Trimble, 33 Neb. 121, 49 N. W. 938, said: " 'The legislature is without power to release any inhabitant or corporation from his or its proportionate share of taxes, nor can it confer

such authority upon county commissioners. * * * The legislature is powerless to confer such authority. It cannot do indirectly what the Constitution prohibits it from doing directly; that is clear. Wood v. Helmer, 10 Neb. 65, 68.' "

In State ex rel. Cornell v. Poynter, 59 Neb. 417, 81 N. W. 431, this court held: "The rule of uniformity prescribed by section 1, article 9, of the constitution, inhibits the legislature from discriminating between taxpayers in any manner whatever.

"Under section 4, article 9, of the constitution the legislature is powerless to pass a law releasing or discharging any individual or corporation or property from the payment of any portion of the taxes to be levied for state or municipal purposes." In the opinion, it is said: "The rule of uniformity inhibits the legislature from discriminating between taxpayers in any manner. See State v. Graham, 17 Nebr., 43. In every instance where this court has spoken upon the subject it has been determined that the legislature is powerless to relieve from the burdens of taxation the property of any individual or corporation, but that the constitutional rule of uniformity requires all taxable property within the taxing district where the assessment is made shall be taxed, except property specifically exempt by the fundamental law. This doctrine is entirely sound, and the language of the constitutional provision we have been considering will not authorize or permit of any other or different interpretation.

"By section 4, article 9, of the constitution the legislature, in plain and unequivocal language, is inhibited from enacting any law releasing or discharging any individual or corporation or property from their or its proportional share of taxes to be levied for state or municipal purposes."

In State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716, this court said: "The subject relating to the rule of uniformity has heretofore received

consideration by this court in the case of the State v. Osborn, 60 Nebr., 415. It is there held that the valuation of property for taxation must be uniform. Says the court in the opinion, at page 419: 'There is another cardinal rule of taxation, and that is that "every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises." Constitution, art. 9, sec. 1. And this rule of uniformity applies not only to the rate of taxation but as well to the valuation of property for the purposes of raising revenue. High School District No. 137 v. Lancaster County, 60 Nebr., 147. The constitution forbids any discrimination whatever among taxpayers. State v. Graham, 17 Nebr., 43; State v. Poynter, 59 Nebr., 417. * * *' "

In Atchison, T. & S. F. Ry. Co. v. Clark, 60 Kan. 826, 58 P. 477, 47 L. R. A. 77, the court said: "As some of the taxpayers appear to have been purposely excluded from the benefit and protection of the law, the tax, therefore, lacks that equality and uniformity essential to its validity. It is a discrimination against one taxpayer in favor of others, and is a denial of the equal protection of the law required by both state and federal constitutions. Absolute equality in taxation is, of course, unattainable, but a law, the manifest purpose and legitimate result of which is discrimination and inequality, cannot be sustained."

In State ex rel. City of Reno v. Boyd, 27 Nev. 249, 74 P. 654, the court said: "The purpose of an exaction from the public in the form of a tax or license, either for revenue or in the exercise of the police power, is for the benefit of the locality from which the money is collected. Any exaction laid upon a district or community in which it has no interest, or imposed for the benefit of others, to which it is not justly bound to contribute, is invalid."

In Newport Mining Co. v. City of Ironwood, 185 Mich. 668, 152 N. W. 1088, the court said: "While exact equality in taxation can never be achieved, intentional inequality of assessment invalidates the tax. Merrill

v. Auditor General, 24 Mich. 170; Auditor General v. Hughitt, 132 Mich. 311, (93 N. W. 621); Solomon v. Township of Oscoda, 77 Mich. 365, (43 N. W. 990); Auditor General v. Pioneer Iron Co., 123 Mich. 521, (82 N. W. 260)."

We conclude as aforesaid that portions of the act, to wit, sections 4 and 5 thereof, are unconstitutional as in violation of Article VIII, section 1, and Article VIII, section 4, Constitution of Nebraska, and in so concluding apply the rule that: "If portions of an act are unconstitutional and the remainder is so connected with the invalid portions that it cannot be upheld without doing violence to the legislative intent as a whole, the entire act must fall, * * *." Thorin v. Burke, 146 Neb. 94, 18 N. W. 2d 664.

It is elementary, of course, that when taxes are levied on property without authority of law a court of equity may enjoin collection thereof. Earl v. Duras, 13 Neb. 234, 13 N. W. 206; Hemple v. City of Hastings, 79 Neb. 723, 113 N. W. 187.

For the reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed, and the cause is remanded with directions to enter a judgment for plaintiff in conformity with this opinion. All costs in this court and the district court are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

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## IN RE PETITION OF WILLIAM RITCHIE ET AL.

53 N. W. 2d 753

Filed June 6, 1952. No. 33188.

1. **Adoption.** Statutes providing for adoption are of civil and not common law origin.
2. ———. Adoption proceedings were unknown to the common law.
3. ———. The matter of adoption is statutory, and the manner of

procedure and terms are all specifically prescribed and must be followed.

4. ———. Statutes which limit to minors persons who may be adopted exclude adults.
5. ———. Under our statutes the adoption of an adult is not authorized.
6. Equity. A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law.
7. ———. The maxim "Equity follows the law" in its broad sense means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common or statute law.
8. ———. The maxim is strictly applicable whenever the rights of the parties are clearly defined and established by law, especially when defined and established by constitutional or statutory provisions.
9. ———. Equity has never been an instrument of law violation and an equity court will not by its decree set aside legislative enactments or render for naught their mandates.
10. Adoption: Equity. Adoption proceedings do not depend upon equitable principles. Where the essential statutory requirements have not been met, equity cannot decree an adoption.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Affirmed.*

*William Ritchie,* pro se.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

So far as involved in this appeal, this proceeding is one to secure a decree of adoption of an adult person. The trial court denied adoption. We affirm the judgment of the trial court.

This proceeding began on December 26, 1951, as an action in equity by the filing in district court of a petition, jointly by William Ritchie and Robert Hun Hee Pai, for adoption and change of name. Mr. Ritchie was

at that time 65 years of age, a widower, and without children. Mr. Pai was of Korean ancestry, a naturalized American citizen, and at the time 26 years of age. It was alleged that Mr. Ritchie desired to adopt Mr. Pai as his son and heir at law; that Mr. Pai desired to accept the adoption; and that it was the desire of both petitioners that Mr. Pai adopt the surname Ritchie to be added to his name. Mr. Ritchie prayed for an order whereby he adopted Mr. Pai as his son and heir at law and that Mr. Pai be granted authority to add the surname Ritchie to his then name. Mr. Pai joined in this prayer.

The matter was first heard on January 28, 1952. At the beginning of the hearing Mr. Ritchie stated that the object of these proceedings was "the adoption" of Mr. Pai "as my son and heir, and by adding the name of Ritchie to his name." There was evidence offered as to the reasons which Mr. Ritchie and Mr. Pai had for desiring to secure this adoption. They are not material to our inquiry and hence are not recited. After evidence was taken the parties rested.

Thereafter on January 29, 1952, Mr. Ritchie and Mr. Pai filed an amendment to the petition for adoption and change of name, wherein it was alleged that on December 26, 1951, the parties entered into a contract whereby Mr. Ritchie agreed that "he would adopt" Mr. Pai as his heir at law and would will to him his property with certain exceptions, in consideration for which Mr. Pai was to change his name as above indicated. This amendment contained a prayer that Mr. Pai be granted authority to change his name as above indicated and that the court find that the contract had been executed and Mr. Pai had performed.

On January 29, 1952, at a second hearing, the contract was offered in evidence.

The trial court entered a decree that Mr. Pai's lawful name should thereafter be Robert Hun Hee Pai Ritchie, and denied adoption. Petitioners appeal. The appeal

does not involve the decree as to the change of name.

Although the prayers of the petition and amended petition are variously worded and by brief here we are asked to approve the contract, the appeal involves, and the petitioners have treated it throughout as, a petition in equity for a decree of adoption. It was so treated at the beginning of the hearing, by the trial judge in his decree, in the motion for a new trial, in the notice of appeal, in the assignments of error, and in the argument here.

The assignments are in effect that the adoption will be beneficial to Mr. Pai and is not contrary to public policy. It is urged that a court of equity has authority to permit the adoption.

It is to be remembered that no one is here challenging the validity of the contract, nor asking that it be enforced, construed, or set aside. The issue is as to the power of an equity court to decree the adoption.

Adoptions are provided for by Chapter 43, article 1, R. S. 1943. Section 43-101, R. S. 1943, provides in part that "Any minor child may be adopted by any adult person or persons." Section 43-102, R. S. 1943, provides that "Any person or persons, desiring to adopt a minor child, shall file in the county court * * * a petition for adoption * * *." The term "minor child" appears throughout the act with reference to the person to be adopted. Section 38-101, R. S. 1943, provides: "All persons under twenty-one years of age are declared to be minors; but in case a female marries under the age of twenty-one years her minority ends."

Petitioners concede that the statutes make provision only for the adoption of minors but contend that the adoption of an adult is not prohibited.

We have held that statutes providing for adoption are of civil and not common law origin. Tiffany v. Wright, 79 Neb. 10, 112 N. W. 311; Nielson v. Kammerer, 128 Neb. 57, 257 N. W. 534.

Adoption proceedings were unknown to the common

law. Ferguson v. Herr, on rehearing, 64 Neb. 659, 94 N. W. 542.

The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed. Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. S. R. 685.

Statutes which limit to minors persons who may be adopted exclude adults. 1 C. J., Adoption of Children, § 13, p. 1376; 2 C. J. S., Adoption of Children, § 13, p. 380; 1 Am. Jur., Adoption of Children, § 13, p. 628; Estate of Taggart, 190 Cal. 493, 213 P. 504, 27 A. L. R. 1360; Estate of Morris, 56 Cal. App. 2d 715, 133 P. 2d 452; McCollister v. Yard, 90 Iowa 621, 57 N. W. 447; Hendy v. Industrial Accident Board, 115 Mont. 516, 146 P. 2d 324.

Consistent with our decisions, it is clear that under our statutes the adoption of an adult is not authorized.

The effect of petitioners' position is that an equity court has the power and should, when equity requires, extend the rights of adoption beyond the plain terms of the statutes and likewise bypass the requirement that a petition for adoption be filed in the county court and the procedures fixed by statute. In short, the request here is that an equity court ignore statutory provisions and do, what petitioners term, equity.

The applicable rules are:

"A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law." State ex rel. Sorensen v. State Bank of Omaha, 128 Neb. 148, 258 N. W. 260.

"The maxim 'Equity follows the law' in its broad sense means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common or statute law.

" 'The maxim is strictly applicable whenever the rights

of the parties are clearly defined and established by law, especially when defined and established by constitutional or statutory provisions.'" Dawson County Irrigation Co. v. Stuart, 142 Neb. 428, 6 N. W. 2d 602.

"Equity has never been an instrument of law violation and an equity court will not by its decree set aside legislative enactments or render for naught their mandates." Oman v. City of Wayne, 149 Neb. 303, 30 N. W. 2d 921. See, also, Warren v. County of Stanton, 147 Neb. 32, 22 N. W. 2d 287.

Adoption proceedings do not depend upon equitable principles. Where the essential statutory requirements have not been met, equity cannot decree an adoption. 2 C. J. S., Adoption of Children, § 1, p. 368. See, also, St. Vincent's Infant Asylum v. Central Wisconsin Trust Co., 189 Wis. 483, 206 N. W. 921; Borner v. Larson, 70 N. D. 313, 293 N. W. 836; In re Francis, 82 Ohio App. 193, 77 N. E. 2d 289; Rivers v. Rivers, 240 Ala. 648, 200 So. 764.

The judgment of the district court denying adoption is affirmed.

AFFIRMED.

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WINIFRED PETERSON ET AL., APPELLANTS, V. WILLIAM D. MASSEY, APPELLEE.
53 N. W. 2d 912

Filed June 13, 1952. No. 33136.

1. Trial. A defendant is entitled to test the sufficiency of plaintiff's evidence without the risk of penalizing himself.
2. ———. When a defendant demurs to the evidence or moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's testimony to be true together with every conclusion which may be reasonably drawn therefrom.
3. ———. When a demurrer to the evidence is sustained the case is ready for judgment.
4. Appeal and Error: Trial. If, on appeal, it is determined that the trial court erroneously sustained either a demurrer to the

evidence or a motion to dismiss, both parties are entitled to be placed in the same position they were in before the error occurred.

5. **Trusts.** The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing.
6. **Partnership.** Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.
7. **Joint Adventures.** A joint adventure is in the nature of a partnership, but may exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit.
8. ———. To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another.
9. **Joint Adventures: Partnership.** The burden of establishing the existence of either a joint enterprise or a partnership is upon the party asserting that the relationship exists.
10. **Trusts: Husband and Wife.** No resulting trust necessarily arises in favor of a person furnishing the consideration, in whole or in part, for the purchase of property taken in the name of another, where the parties were sufficiently close so as to give rise to the presumption that a gift was intended. And where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift.
11. ———: ———. An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual services rendered him outside of her domestic duties is valid, and, when established by a preponderance of the evidence, is enforceable as against him or his estate.
12. **Husband and Wife.** Though a wife renders services outside of the ordinary household duties, it is generally held that there is no implied obligation on the husband's part to pay her for them.

APPEAL from the district court for Garfield County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

*Herbert W. Baird,* for appellants.

*William F. Manasil* and *Conrad C. Erickson, for appellee.*

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Winifred Peterson as administratrix of the estate of Cora E. Massey, deceased, and Winifred Peterson and Claude Sizemore as heirs of Cora E. Massey, deceased, brought this action in the district court for Garfield County against William D. Massey. The purpose of the action is to establish that Cora E. Massey, who died intestate, was, at the time of her death on June 26, 1944, the owner of an undivided one-half interest in all the property, both real and personal, of which defendant was then seized and possessed, and to declare he is holding her interest therein in trust for the heirs of her estate and for an accounting thereof. Trial was had. After plaintiffs produced their evidence and rested, defendant demurred thereto. The court sustained the demurrer and thereupon rendered judgment for defendant. Plaintiffs filed a motion for new trial and, from the overruling thereof, have taken this appeal.

Appellants contend that in an equity action a defendant cannot test the sufficiency of the evidence without either resting or presenting his own case. While this is the rule in some states, this jurisdiction holds to the contrary.

A defendant is entitled to test the sufficiency of plaintiff's evidence without the risk of penalizing himself.

When a defendant demurs to the evidence or moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's testimony to be true together with every conclusion which may be reasonably drawn therefrom.

When a demurrer to the evidence is sustained the case is ready for judgment.

If, on appeal, it is determined that the trial court

erroneously sustained either a demurrer to the evidence or a motion to dismiss, both parties are entitled to be placed in the same position they were in before the error occurred.

See, Pettegrew v. Pettegrew, 128 Neb. 783, 260 N. W. 287; Lucas v. Lucas, 138 Neb. 252, 292 N. W. 729; Casper v. Frey, 152 Neb. 441, 41 N. W. 2d 363; Paul v. McGahan, 152 Neb. 578, 42 N. W. 2d 172; Busteed v. Sheffield, 153 Neb. 253, 44 N. W. 2d 471.

The question then arises, is the evidence introduced sufficient to support a judgment for appellants? This being an equitable action to enforce a constructive trust, we shall consider the record de novo. In doing so we shall apply the rules in regard thereto that have hereinbefore been set forth.

Cora E. Sizemore and William D. Massey, appellee herein, were married on January 25, 1909. She had been previously married, and appellants Winifred Peterson and Claude Sizemore were children of that union. They were apparently young when their mother remarried.

After their marriage the Masseys moved to a farm near Decatur, Nebraska. Later they moved to a farm near Rosalie, then to one near Bartlett, and finally to one near Ericson. All of these places are in Nebraska. Then, about 1931, they moved to Burwell, Nebraska, where they bought a home. They lived there until Mrs. Massey died. She died on June 26, 1944. The evidence shows that while they lived on these farms that on occasions Mrs. Massey worked in the field, which work included shucking some corn.

When the Masseys started farming they rented. It appears they had few worldly possessions to start with although Mrs. Massey had about $700. Her parents helped them with some machinery and the use of horses.

The first land the Masseys bought was a 40-acre tract near Rosalie in Thurston County, Nebraska. This tract they later sold and then bought a tract of 140

acres near Ericson. This was also sold. At the time of Mrs. Massey's death appellee owned the home they then lived in in Burwell, a business building in Burwell, and a 1,200-acre ranch north of Burwell, all of which was then reasonably worth about $10,100. He was possessed of very little personal property and about all the cash he had was used in paying the expenses of Mrs. Massey's last sickness and burial. It appears that whenever appellee was considering selling or buying any property he would always talk the matter over with Mrs. Massey and in doing so refer to the matter as "our" property, saying that "It's your's as well as mine." Then she in turn would tell him he was head of the household and whatever he did was all right.

Appellant Winifred Peterson did not immediately live with the Masseys after the marriage but later, when they lived near Rosalie, she joined their household. She was then 14 years of age. She lived with them about four years when she was married. After that she did not live with them again although she visited in their home occasionally. Nothing is shown as to appellant Claude Sizemore in this respect.

In Box v. Box, 146 Neb. 826, 21 N. W. 2d 868, we quoted with approval, in regard to constructive trusts, the following from Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679: "Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. Again, if a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits; out of such circumstances

or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title." Of course the burden of establishing such a trust is always upon the person who bases his rights thereon and he must do so by evidence the quality of which is clear, satisfactory, and convincing. 54 Am. Jur., Trusts, § 618, p. 477.

Appellants' position is primarily based on the allegations of their second amended petition to the effect that when Cora E. Sizemore and William D. Massey were married they orally agreed upon and entered into a business partnership or joint enterprise for the purpose of engaging in farming, ranching, and trading in farms, ranches, and residence properties, including acreages; that she contributed $750 of money and goods as original capital therefor; that she agreed to and did devote all of her nondomestic or nonhousehold time and labor thereto; and that all the properties owned by them and held in his name at the time of her death were the result thereof and that she owned a one-half interest therein by reason thereof.

"A partnership is an association of persons organized as a separate entity to carry on a business for profit." § 67-306, R. R. S. 1943.

"Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions." Baum v. McBride, 143 Neb. 629, 10 N. W. 2d 477.

"A joint adventure is in the nature of a partnership, but may exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit.

"To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects

of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another." Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368.

The burden of establishing the existence of either a joint enterprise or a partnership is upon the party asserting that the relationship exists. See, Baum v. McBride, *supra;* 30 Am. Jur., Joint Adventures, § 63, p. 711. This burden the appellants have not carried for there is no evidence to establish either.

The evidence does establish that Mrs. Massey had $700 at the time of the marriage which was apparently used in their farming operations. However the evidence fails to prove that there was any understanding or agreement between them in regard thereto. But even though it could be said that this money ultimately became invested in one of the properties of which appellee was seized at the time of Mrs. Massey's death that fact would not help the appellants for it would be presumed to be a gift. See, Brodsky v. Brodsky, 132 Neb. 659, 272 N. W. 919; First Trust Co. v. Hammond, 140 Neb. 330, 299 N. W. 496. As stated in Brodsky v. Brodsky, *supra*: "No resulting trust necessarily arises in favor of a person furnishing the consideration, in whole or in part, for the purchase of property taken in the name of another, where the parties were sufficiently close so as to give rise to the presumption that a gift was intended. And where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift." And the same would be true of personal property. See First Trust Co. v. Hammond, *supra.*

As to decedent's work outside of what were her domestic duties, this court has said: "An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual serv-

ices rendered him outside of her domestic duties is valid, and, when established by a preponderance of the evidence, is enforceable as against him or his estate." In re Estate of Cormick, 100 Neb. 669, 160 N. W. 989.

But here no such express contract was established. In the absence thereof the following principle is applicable and controlling: " 'Though a wife renders services outside of the ordinary household duties, it is generally held that there is no implied obligation on the husband's part to pay her for them.' 13 R. C. L. 1089, sec. 113." Brodsky v. Brodsky, *supra.*

We have examined the evidence, which is very brief, and find nothing therein that would give rise to and support any holding that Cora E. Massey, at the time of her death, was the owner of any interest in the property of which appellee was then seized. In view thereof the claims of the appellants are without merit, the demurrer to the evidence was properly sustained, and judgment for appellee is correct.

Other questions are raised by appellee which are not without merit but in view of the foregoing need not be discussed. The judgment of the trial court is affirmed.

AFFIRMED.

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IN RE ESTATE OF ANNA L. BREUER, DECEASED. KARL BREUER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ANNA L. BREUER, DECEASED, ET AL., APPELLEES, V. FRED J. CASSIDY ET AL., APPELLANTS.

54 N. W. 2d 75

Filed June 13, 1952. No. 33145.

1. **Executors and Administrators.** In the settlement of an estate an administrator is merely the agent and trustee of the decedent. He possesses only such powers as are granted to him by statute, and he must discharge the trust subject to all limitations imposed upon him.

2. ———. Compensation for services rendered during the lifetime of a decedent must be based on an agreement, express or implied, to pay therefor, which is established by a preponderance of the evidence.
3. ———. Every person having a claim or demand against the estate of a deceased person must exhibit it to the county judge within the time fixed, in accordance with sections 30-601 and 30-609, R. R. S. 1943; otherwise it is forever barred.
4. ———. A volunteer, who pays claims of a decedent in his lifetime without taking an assignment and making proof thereof, in accordance with the statute, does not have an allowable claim. The fact that the volunteer subsequently becomes administrator of the estate does not change the requirement.
5. ———. One who intermeddles in an estate after the death of the decedent and without authority pays alleged claims with his own funds without taking assignments thereof or making proof, as the statute requires, occupies the same position as a volunteer acting before the death of the decedent.
6. Courts: Executors and Administrators. The county court has no jurisdiction over a claim against the estate of a decedent, which is not properly filed for allowance until after it has been finally barred by the statute of nonclaims.
7. Executors and Administrators. An administrator who pays out funds of the estate in payment of attorney fees and other expenses incurred in administering the estate, without their being approved and finally allowed by the county court, does so subject to such approval and final allowance.
8. Costs. It is a general rule that representatives of estates are personally liable for costs incurred on an appeal resulting from their fault or misconduct.

APPEAL from the district court for Custer County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

*Fred J. Cassidy* and *Max Kier*, for appellants.

*Merle M. Runyan*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an appeal from a decree of the district court for Custer County confirming the final account of the

administrator in the estate of Anna L. Breuer, deceased, on appeal from the county court of such county.

The appellee contends that the issues sought to be litigated in this court were not raised properly by the parties appealing. In this respect the record shows that the appellants and appellees entered into a signed stipulation appearing in the record wherein it was stipulated "that the above matter may be tried to the Court without a jury, on the issues presented by the claim of Karl Breuer, report and final account of Karl Breuer, administrator, the objections filed to said claim and said report and final account, and the order of November 8, 1949, designated as final decree, and that it shall not be necessary to file additional pleadings to present said issues, unless it shall be so ordered by the District Court of Custer County, Nebraska." All the issues raised by this appeal were raised in the district court by one or more of the appellants. The district court had jurisdiction of the issues on the appeal and the stipulation removes the technicalities of pleading of which the appellants complain.

This appeal involves the correctness of the court's rulings on (1) the claim of Karl Breuer for $589.03, (2) the amount of administrator's fees allowed, (3) the amount allowed as attorney's fees, and (4) the items set forth in the administrator's final account. We shall dispose of these matters in the order listed.

The record shows that Anna L. Breuer died intestate on March 30, 1949, leaving as her sole heirs her brother, Frederick W. Blummer, and her sister, Mary Jahn. The latter subsequently passed away, and the administrator of her estate and her heirs-at-law, or some of them, are the appellees herein. On June 8, 1949, Karl Breuer was appointed administrator of Anna L. Breuer's estate and letters of administration were issued on June 10, 1949. The time fixed for filing claims was September 27, 1949. The claim of Karl Breuer was filed on September 3, 1949. The final account of the administrator

was filed on October 17, 1949, and a final decree approving it was entered on November 8, 1949.

It also appears that John D. Breuer, the husband of Anna L. Breuer, died on January 11, 1949, leaving a will in which Anna L. Breuer was designated as sole beneficiary. After Anna L. Breuer renounced her appointment as executrix of her husband's estate, Karl Breuer, her husband's brother, was appointed administrator with will annexed. On March 21, 1949, Karl Breuer filed a petition for the appointment of a guardian for Anna L. Breuer, who died before further action was taken thereon. On May 16, 1949, Karl Breuer was appointed special administrator of the estate of Anna L. Breuer, and he filed his final account as such on June 8, 1949, the date of his appointment as administrator of the estate of Anna L. Breuer. He was discharged as special administrator on June 13, 1949.

The record shows that Karl Breuer filed a claim against the estate in the amount of $589.03. The record does not reveal that this claim was ever allowed except as a credit to Karl Breuer in his report and final accounting as administrator of the estate. The final account was approved by the county court for Custer County on November 8, 1949. The claim contains a number of items which in substance were as follows: Mileage for trips from his home to the home of the deceased prior to her death; mileage and expenses for a trip to Lincoln to see the brother of deceased before her death; and compensation for laundry work and for miscellaneous items purchased for the home, including a grocery bill, all incurred during the lifetime of the deceased. In a second group of items in the claim were those incurred after the death of Anna L. Breuer on March 30, 1949, and prior to the appointment of Karl Breuer as special administrator on May 16, 1949, and are generally described as follows: Mileage, expenses, and compensation for Karl Breuer and his wife for cleaning up the house after the death of Anna L. Breuer;

amounts paid for nonprofessional care of the deceased during her last sickness; amounts paid himself and others in repairing a house for rental purposes which belonged to the estate; and a general item for 11 days work at $7.50 a day, alleged to be for work not otherwise included in the claim.

As to the first group consisting of items accruing in her lifetime, we fail to find any basis for their allowance as valid claims against the estate of Anna L. Breuer. There is no agreement established showing that the deceased agreed to pay the mileage claimed for traveling to and from his home, or in making the trip to Lincoln. The most that the record shows is that two witnesses testified that they heard the deceased ask Karl Breuer shortly before her death if he would attend to her business and that he responded in the affirmative. Such an understanding, even if made, does not contemplate the payment of the mileage and expenses here claimed. It is evident that these items were intended to be gratuitous at the time they were incurred and that there was no mutual expectation by claimant and decedent that the expenses here claimed were to be paid for. Such services are usually rendered by members of the family in times of emergency without any intention of making claim therefor. Compensation for such services must be based on an agreement to pay, express or implied, which is established by a preponderance of the evidence. The record in this case does not sustain any such agreement. As to the claim for the grocery account and other miscellaneous items paid with his own funds during the lifetime of Anna L. Breuer, they are not allowable for another reason. Our statute provides that "Every person having a claim or demand against the estate of a deceased person who shall not after the giving of notice as required in section 30-601 exhibit his claim or demand to the judge within the time limited by the court for that purpose, shall be forever barred from recovering on such claim or demand, or setting off the same

in any action whatever." § 30-609, R. R. S. 1943. The persons holding the obligations against the estate filed no claim therefor, and it is fundamental that an administrator may not waive the defense of nonclaim. The claimant here took no assignment of the claims in question and has therefore failed to show, as a matter of law, that he was the owner of any claim against the estate for these items. When he personally paid these claims he was a volunteer and nothing more. He was not authorized to pay claims of Anna L. Breuer during her lifetime. At most, he was but an agent who might obligate his principal in her lifetime. But any claims thus incurred must be filed in the same manner as if she contracted them herself. Reasons of public policy demand that claims against the estates of deceased persons be filed by the owners thereof within the time prescribed by law, that the administrator scrutinize them as to their correctness and object to those appearing to be improper in whole or in part, and that they be paid only after they have been allowed by the county court. The account of the administrator will be surcharged with the amount of these items which the record shows to be $129.22.

As to the second group, consisting of items which accrued after the death of Anna L. Breuer and before the appointment of Karl Breuer as special administrator, a different rule is applicable. During this period Karl Breuer was an intermeddler in the estate of Anna L. Breuer. If the estate demanded immediate handling, the provisions of our statute providing for the appointment of a special administrator afford an adequate remedy. No claim is here made that all the assets of the estate have not been accounted for. Under such circumstances Karl Breuer was, strictly speaking, an intermeddler and not chargeable as an executor de son tort. 34 C. J. S., Executors and Administrators, § 1063, p. 1359 et seq. Where one takes possession of the assets of an estate, without authority to do so, he will be held liable therefor as an

executor de son tort. The expression is used as a basis of fixing liability and it does not have the effect of making one a de facto executor. The assets of the estate of Anna L. Breuer are properly accounted for and consequently any rules of law applicable to an executor de son tort have no application here. See Gilbert v. First Nat. Bank, 154 Neb. 404, 48 N. W. 2d 401. It is clear from the record that Karl Breuer had no authority to meddle or interfere in the estate of Anna L. Breuer until he was appointed special administrator on May 16, 1949. Prior to that time he was a stranger to the estate, bound by the same rules as any other third person. He could, of course, have purchased claims by assignment during this period, subject to their subsequent approval in a proper proceeding by the county court. But he had no authority to pay off such claims and assert them as a part of a claim of his own merely on the basis that he had voluntarily paid them. Such claims must be filed, proved, and their ownership established in the same manner as is required of any other creditor. This he did not do. The fact that he was later appointed administrator gives him no rights not possessed by any other creditor. The evidence does not show that the claims were properly made or that Karl Breuer became the assignee thereof. To permit the allowance of claims in the manner here described would amount to a circumvention of the powers of the county court to pass upon their validity in the manner that applicable statutes provide. That part of the claim of Karl Breuer which accrued after the death of Anna L. Breuer and before the appointment of Karl Breuer as administrator of her estate is not valid, and he will be surcharged with $443.73, the amount thereof.

The appellants contend that Karl Breuer was allowed an excessive administrator's fee, the amount being $600. The evidence shows that total cash receipts coming into his hands as administrator amounted to $5,217.32. There was also a real estate mortgage in the amount of $5,650.

The total personal property in the estate therefore amounted to $10,867.32. The commission allowed an administrator on this amount in the absence of extraordinary services is $267.35. § 30-1412, R. S. Supp., 1949. An examination of the evidence shows that no extraordinary services were performed by the administrator. Those claimed to be such were the services required of an administrator in the common course of his duty. The final account of the administrator will therefore be surcharged by the excess commission charged in the amount of $332.65.

The administrator paid out attorney fees and expenses to R. E. Brega in the amount of $967.19, without an order allowing same by the county court. The sum was approved subsequently by the county court when it approved the final account of the administrator. Any payment made in advance of allowance is subject to the approval of the county court and, if finally disapproved in whole or in part, the administrator will be surcharged with the excessive payment. The evidence sustains the findings of the trial court in the allowance of attorney fees and expenses, except as to the allowance of $100 for filing a guardianship proceeding against Anna L. Breuer in her lifetime. No claim was ever filed against her estate within the time fixed for filing claims. But in any event, it was not an obligation contracted by Anna L. Breuer in her lifetime, nor one for which her estate could be held liable. No basis exists for the allowance of this $100 out of the estate of Anna L. Breuer, and the administrator will be surcharged with this $100.

The appellants contend that the report and final account of the administrator credits the administrator with items for which the estate is not liable. The administrator takes credit for the amount of $16.95 which he paid to Lonnie Swisher for fuel oil and for $4.75 he paid to Rufus Twist for repairing a stove. He also takes credit for $57 which he paid Dr. E. H. Reeves for services rendered Anna L. Breuer in her last sickness. These

items accrued in the lifetime of Anna L. Breuer and were paid by the administrator on July 13, 1949. Claims for these items were never filed. The administrator merely paid the claims and took credit for the same in his final account. This he cannot lawfully do. An administrator is not entitled to credit for payment of provable claims against the estate which originated before the decedent's death and which were not filed and allowed as required by law. Administrators cannot waive the defense of nonclaim nor circumvent the functions of the county court in auditing and allowing claims against the estates of deceased persons before their payment. Huebner v. Sesseman, 38 Neb. 78, 56 N. W. 697; Estate of Fitzgerald v. First Nat. Bank of Chariton, 64 Neb. 260, 89 N. W. 813; Schaberg v. McDonald, 60 Neb. 493, 83 N. W. 737. The final account of the administrator will be surcharged with the three items here discussed amounting to $78.70. Other contentions of appellants concerning the correctness of the final account are not sustained. The evidence is not sufficient to show that such credits had not been allowed as proper claims, or that the mileage and other expenses claimed were not proper charges against the estate.

In the settlement of an estate an administrator is merely the agent and trustee of the decedent. He possesses only such powers as are granted to him by statute and he must discharge the trust subject to all the limitations imposed upon him. He may not treat the property of the decedent as his own without peril to himself. He must comply with applicable statutes and he may not waive them as to others claiming an interest in the estate, either as creditor or beneficiary. He must account to the county court and obtain approval of his acts. Volunteers and intermeddlers in estates of deceased persons are liable for any loss accruing to the estates resulting from their acts. An executor or administrator becomes liable for his wrongful acts while serving in such capacity. These general rules apply be-

cause the decedent is not present to protect the interests of his estate. The law undertakes to do it for him and the responsibility of applying it in the first instance is lodged in the county courts of this state. This function is an important one and should be discharged strictly in compliance with applicable statutes. Unless this be done, the estates of deceased persons will become the prey of unscrupulous persons and defeat the intention of legislative enactments on the subject.

The judgment of the district court is reversed and remanded with directions to surcharge the final account of the administrator in the sum of $1,084.30 in accordance with the findings of this opinion. The costs of this appeal will be taxed against Karl Breuer personally in accordance with our holding in In re Estate of Jurgensmeier, 145 Neb. 459, 17 N. W. 2d 155, wherein we stated the general rule to be that a representative of an estate is personally liable for costs when he unsuccessfully appeals in his own interest from a settlement of his final account, or when an appeal is successful because of his fault or misconduct.

REVERSED AND REMANDED WITH DIRECTIONS.

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DONALD A. MARTIN, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.
53 N. W. 2d 923

Filed June 13, 1952. No. 33148.

1. **Municipal Corporations: Injunctions.** One seeking equity to restrain an act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation.
2. ———: ———. A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay.

3. ———: ———. A resident taxpayer without showing any interest or injury peculiar to himself may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
4. **Pleading.** A general demurrer admits the truth of all alleged material facts and the reasonable inferences to be drawn therefrom.
5. **Municipal Corporations: Injunctions.** In an action by a taxpayer to enjoin municipal authorities from making illegal purchases the seller is not a necessary party.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Reversed and remanded with directions.*

*Louis B. Finkelstein,* and *Littrell & Patz,* for appellant.

*C. Russell Mattson* and *John H. Comstock,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action in equity by Donald A. Martin, plaintiff and appellant, against the City of Lincoln, a municipal corporation organized under the laws of Nebraska, Victor E. Anderson, Mayor, Fern Orme, John Comstock, Roy A. Sheaff, Thomas R. Pansing, Arthur J. Weaver, and Rees Wilkinson, members of the City Council, and Raymond Osborn, Director of the Department of Public Welfare and Safety of the City of Lincoln, defendants and appellees, to enjoin the defendants from entering into a contract with one M. H. Rhodes, Inc., for the purchase of certain parking meters and from expending public funds in payment of the purchase price of the meters. After the commencement of the action Chauncey W. D. Kinsey and Pat Ash were substituted as defendants for the defendants Pansing and Weaver.

The action was instituted by petition to which the defendants jointly and severally filed a demurrer. The demurrer contained four grounds as follows: (1) That

the court has no jurisdiction of the subject matter; (2) that the plaintiff has no legal capacity to sue; (3) that there is a defect of parties defendant; and (4) that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the respective defendants or any of them.

The district court sustained the demurrer, whereupon the plaintiff elected to stand upon his petition. Judgment of dismissal was rendered and plaintiff has appealed therefrom.

The essential allegations of the petition are that the city of Lincoln is a city operating under a home-rule charter, and that the charter contains the following: "Before the City Council shall enter into any contract or authorize any expenditures involving over $500, they shall cause to be made and filed an estimate of the total costs thereof, together with detailed plans and specifications, * * * and the work or improvement shall be done substantially in accordance therewith. No contract shall be entered for a price exceeding such estimate, and the City Council shall, except in cases of emergency, advertise for bids and cause the amount of such estimate to be published therein. Such advertisement shall be published in some daily newspaper of general circulation in the city for at least 10 days * * *."

The city council caused to be made specifications for the purchase of 350 parking meters which were approved on January 26, 1951. The estimate of the cost of the meters was $28,000. Pursuant to the ordinance and in accordance with the approved specifications advertisement for bids was published. A considerable number of bids were received among which was that of M. H. Rhodes, Inc. The bid was $57.50 a meter or $20,125.

It was alleged that the meters did not conform to the specifications and were inferior in that, whereas the specifications called for meters the signals of which should be plainly visible from front and back of the

meter, those on the meters described in the bid were visible only on one side.

It was alleged that the purchase of and payment for these meters would result in an unlawful expenditure of the purchase price.

In the petition were pleaded certain ordinance provisions of the city which were in force at all times of concern in the action. Among these was the following from ordinance No. 4301, section 902, providing for exaction of fees from parking meters and defining the purpose and use to which the fees so exacted should be applied: "For the purpose of defraying the cost to the city of regulating, supervising and policing the exercise of the privilege of parking vehicles in, along, or upon the streets so designated by the Council, there is hereby imposed a fee, as hereinafter provided, upon each person parking a vehicle upon the streets so designated, between the hours of 9:00 A. M. and 6:00 P. M. of any day, except Sundays and legal holidays. * * *."

Also among these was article 9, section 909, of ordinance No. 4301 as follows: "The fees collected under this article shall not exceed the reasonable cost to the city of regulating, supervising and policing the exercise of the privilege of parking. All monies received from the operation of said parking meters, shall be deposited with the CITY TREASURER and by him placed to the credit of the POLICE DIVISION of the GENERAL FUND of the CITY."

The specifications upon which bids were requested were made a part of the petition. The following are provisions contained in the specifications:

"Section 2. CERTIFIED CHECK. Each bid must be accompanied by a certified check in the sum of five (5) per cent of the total amount of the bid, made payable to the order of Frank J. Miller, City Treasurer, which will be retained by and forfeited to the City of Lincoln, as liquidated damages, if such bid is accepted and a contract is awarded and the bidder or bidders

fail to enter into a contract with the City and furnish satisfactory bond within ten (10) days after the date of such award."

"Section 5. CONTRACT AND BOND. The successful bidder or bidders will be required, within ten (10) days after the award of contract, to enter into and sign a contract with the City, and also furnish an approved surety company's bond in the sum of the full contract price, conditioned upon the faithful performance of all the terms and conditions of the contract."

"Section 20. BASIS OF PAYMENT. All bids shall be made with the understanding that the City will make payment for all meters purchased by making monthly remittances at the rate of one-half the average monthly receipts from such meters, such payments to continue until the meters are fully paid for."

On what ground or grounds the demurrer was sustained does not authentically appear, hence it becomes necessary to consider all of the grounds assigned, at least to the extent argued in the brief, since it was the plaintiff's petition that was stricken down by the ruling and judgment.

The first assignment has received no substantial consideration in the brief and it will be treated as having been abandoned by the defendants. Furthermore, on its face, it is clearly without merit. No citation to sustain this viewpoint is necessary.

The second and fourth assignments are in essence interrelated and will be considered together. The theory of the two is that the plaintiff as a citizen and taxpayer has no legal capacity to maintain an action to enjoin the acts complained of, hence the petition does not and could not contain sufficient allegations of fact to constitute a cause of action in his favor.

The substantial theory of the defendants is that the petition discloses that the plaintiff is a private citizen and taxpayer; that in his capacity as a citizen and taxpayer he has not shown any special injury to himself

independent of injury to the general public; that the alleged illegal expenditure is not of public funds raised for governmental purposes; and that the proposed expenditure would not increase the burden of taxation, therefore the petition shows that plaintiff has no legal capacity to sue, and in consequence does not state facts sufficient to constitute a cause of action.

It is an established principle in this jurisdiction that a person seeking equity to restrain an act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation. Kirby v. Omaha Bridge Commission, 127 Neb. 382, 255 N. W. 776. See, also, Miller v. Inc. Town of Milford, 224 Iowa 753, 276 N. W. 826, 114 A. L. R. 1423.

Another established principle, which is conceded by defendants, is that a resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay. Crampton v. Zabriskie, 101 U. S. 601, 25 L. Ed. 1070; Woodruff v. Welton, 70 Neb. 665, 97 N. W. 1037; Fischer v. Marsh, 113 Neb. 153, 202 N. W. 422; Davenport v. Kleinschmidt, 6 Mont. 502, 13 P. 249, 8 Mont. 467, 20 P. 823.

Another principle is that a resident taxpayer without showing any interest or injury peculiar to himself may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. Woodruff v. Welton, *supra;* Fischer v. Marsh, *supra;* Noble v. City of Lincoln, 153 Neb. 79, 43 N. W. 2d 578; Miller v. Inc. Town of Milford, *supra.*

The decision upon these two grounds of demurrer depends upon an application of these principles to the allegations of fact contained in the petition.

The allegations of fact contained in the petition must be taken as true under the rule that a general demurrer admits the truth of all alleged material facts and the reasonable inferences to be drawn therefrom. Central Nebraska P. P. & I. Dist. v. Walston, 140 Neb. 190, 299 N. W. 609; City of Grand Island v. Willis, 142 Neb. 686, 7 N. W. 2d 457; In re Estate of Halstead, 154 Neb. 31, 46 N. W. 2d 779.

It follows therefore that for the purpose of this review it must be said that the contract which the city proposes to let to M. H. Rhodes, Inc., is an illegal one in that the meters involved are inferior and do not conform to the requirements of the specifications.

This being true it becomes necessary to decide within the meaning of the legal principles announced whether or not the plaintiff herein may maintain the action. If this proposed contract calls for the expenditure of public funds raised for governmental purposes then the right of the plaintiff to maintain the action may not properly be denied.

We are convinced that the petition discloses conclusively that this proposed contract would be a charge against public funds raised and to be raised for governmental purposes.

The ordinances quoted disclose in specific and unambiguous terms that the fees from all parking meters, including these if they are allowed to be installed, are to be collected and allocated to policing which is a governmental purpose and function.

The defendants arguendo say that this is not true as to these. In support of their argument the defendants rely on section 20 of the specifications which has been quoted. They say that this provision requires that payment shall be made out of the avails of these meters. The provision may not be so interpreted, first because the ordinance does not permit it, and second, the specifications do not so provide. It furnishes a measure only of the city's monthly obligation against its funds. The ob-

ligation is the equivalent of one-half of the monthly receipts but not one-half of the receipts.

The distinction is real and not fanciful. By way of illustration, it is well known that funds may be and frequently are lost or stolen or for other reasons never reach their proper repository. If that should happen for any day or month it could not well be said that to that or to any extent would the monthly obligation of the city be reduced.

The remaining ground of demurrer to be discussed is that there is a defect of parties defendant. As the basis for this the defendants urge that M. H. Rhodes, Inc., being the bidder to which it was proposed to let the contract, was a necessary party defendant.

Examination discloses that the cases cited in support of the defendants' theory that M. H. Rhodes, Inc., was a necessary party relate to situations where a municipality has entered into a contract with a third party. None of them deals with a situation such as here where according to the petition no contract has been entered into. There was a bid which was approved but sections 2 and 5 of the specifications make clear that no contractual relation did or could exist unless and until a contract was signed and a performance bond furnished. The authorities are therefore not in point.

It has been held that in an action by a taxpayer to enjoin municipal authorities from making illegal purchases the seller is not a necessary party. Johnson v. Farley, 8 Ohio N. P. 498; City Water Supply Co. v. City of Ottumwa, 120 F. 309; Williams v. Klemmer, 177 Minn. 44, 224 N. W. 261; Davenport v. Kleinschmidt, *supra*.

We conclude therefore that the demurrer was improperly sustained. The judgment of the district court is therefore reversed and the cause remanded with directions to overrule the demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

FRANCIS E. FLAHERTY, APPELLEE, V. CLAY CARSKADON, APPELLANT.
53 N. W. 2d 756

Filed June 13, 1952. No. 33163.

1. **Trial.** In the trial of an action at law where a jury is waived the findings of fact have the same effect as the verdict of a jury.
2. **Trial: Appeal and Error.** The findings of fact in a law action where a jury has been waived will not be disturbed unless they are clearly wrong.
3. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, the rules of court require that appropriate reference be made to specific evidence against which objection is urged.

APPEAL from the district court for Platte County: ROBERT D. FLORY, JUDGE. *Affirmed.*

*William S. Padley,* and *Beatty, Clarke, Murphy & Morgan,* for appellant.

*Brower & Brower,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action at law by Francis E. Flaherty, plaintiff and appellee, against Clay Carskadon, defendant and appellant, for the recovery of $300 which the plaintiff claims is the balance due and owing on an oral contract for services performed. The alleged service covered a period of two months and plaintiff claims that the reasonable value of the service was $500 of which he received $200.

The defendant by answer admits a contract of employment but says that it was for $200 a month and that the wages earned were $166.77. He says that plaintiff received $200 which was $33 in excess of what he earned, and of course he denies any indebtedness.

The defendant in his answer filed in effect a cross-petition in which he claims that because of neglect

and omission of the plaintiff in the performance of the work covered by the contract of employment the defendant has been damaged in the amount of $2,000 by reason of which he seeks a recovery against the plaintiff for $999.99. The action originated in the county court and obviously the reason for the difference between the amount of damage claimed and the recovery sought is the fact that the maximum recovery allowable in the county court is $1,000. There was a denial by plaintiff of the allegations of the answer.

A jury was waived and a trial was had to the court. By the judgment the defendant was denied a recovery on his cross-petition and judgment was rendered in favor of plaintiff on his cause of action for $184 with interest at six percent from the date of judgment and costs amounting to $62.92. From the judgment the defendant has appealed.

A jury having been waived the findings of fact made have the same effect as the verdict of a jury and may not be disturbed on appeal unless they are clearly wrong. Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768; Floyd v. Edwards, 152 Neb. 673, 42 N. W. 2d 292.

It cannot be said that the findings of fact as to plaintiff's alleged contract of employment, his work thereunder, or the amount due him were clearly wrong. He testified in detail to the conversations which culminated in the contract and his performance thereunder. There is nothing in this testimony to render it incapable of belief. If it had been accepted in its entirety it would have been sufficient to sustain a judgment for $200 instead of $184.

The trial court, as was its right, weighed the evidence and found that the lesser amount was due. This was an advantage in favor of the defendant of which of course he had no cause for complaint.

There is therefore no basis for disturbing the findings and judgment as to plaintiff's cause of action and this

conclusion disposes of all assignments of error relating thereto.

As to the cross-petition the defendant says that the court erred in excluding evidence offered to prove damage as alleged. This assignment may properly receive no consideration. Reference has not been made to any particular ruling or rulings on evidence which was offered and rejected in the statement of the case, the review of the evidence, or the argument.

This calls for the application of the following: "In order that assignments of error as to the admission or rejection of evidence may be considered, the rules of court require that appropriate reference be made to the specific evidence against which objection is urged." Joiner v. Pound, 149 Neb. 321, 31 N. W. 2d 100.

The defendant says, which of course is independent of the error relating to the rejection of evidence, that the court erred in refusing to render judgment in favor of defendant on his cross-petition.

As to this there is an absence of proof of certain essential elements of the pleaded cause of action. It was pleaded that plaintiff failed to properly cultivate corn, which was the important work contemplated by the contract for services, and as a consequence more than 40 acres were destroyed by weeds; and that if the more than 40 acres had been cultivated they would have produced 2,000 bushels of corn of the value of $2,000 above the cost of harvesting.

The record discloses that about 40 acres of corn were plowed up. This was done with the consent of defendant, on the representation of the plaintiff that on account of weeds it was worthless. This consent was given in a telephone conversation on August 3, 1949. It fairly appears from the testimony of plaintiff that the weeds resulted from inability to cultivate because of rainfall and the texture of the soil. The evidence of defendant as to the condition of the field when it was broken up is his inferences drawn from what he apparently saw on

June 18, 1949, when the contract was made, and on and after August 17, 1949, which was after the breaking. He was on the farm on two occasions between these dates but did not examine the field.

Whether or not this evidence of the defendant had probative value we do not need to decide since, assuming that it did, the finding in relation thereto was in favor of the plaintiff. Under the rule already stated, a jury having been waived, the finding must be accepted by this court.

There is another reason why the court did not err in rendering judgment against the defendant on his cross-petition. The defendant wholly failed to prove or offer to prove the amount or any portion of the amount of the loss which he claims to have sustained by the alleged acts or omissions of the plaintiff. There was no evidence in this respect upon which to base a judgment in favor of defendant on his cross-petition.

The judgment of the district court is affirmed.

AFFIRMED.

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STEPHEN M. GASPER, APPELLANT, V. JULIUS STANLEY MAZUR ET AL., APPELLEES.
54 N. W. 2d 66

Filed June 13, 1952. No. 33181.

**Judgments.** After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Reversed and remanded with directions.*

*August Ross,* for appellant.

*George Evens,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

The plaintiff, Stephen M. Gasper, brought this action in the district court for Douglas County to foreclose a second mortgage on real estate owned by defendants Julius Stanley Mazur and his wife Evelyn Mazur. In the same proceedings the defendants filed an application to vacate and set aside the decree of foreclosure, order of sale, and confirmation thereof; to cancel the sheriff's deed; and to enjoin the sheriff from executing the writ of assistance issued to him. The trial court, upon hearing the cause at a subsequent term of court, sustained the defendants' application. The plaintiff filed a motion for new trial which was overruled. Plaintiff appeals from this order.

For convenience we refer to the parties as they were designated in the district court.

The record shows the defendants purchased the property in controversy on October 27, 1948, from John Gasper, the father of the plaintiff, for one dollar and other valuable consideration. There was a first mortgage on the property held by the Prudential Insurance Company of America, hereafter referred to as Prudential, in the amount of $7,988.50. The defendants were to pay to Prudential $57.84 a month on the principal, interest, taxes, and insurance. When the property was purchased the defendants made a payment of $1,392.82. They were informed by John Gasper that this payment was insufficient, and they would be required to pay an additional sum of $413.15. This was accomplished by the plaintiff, the son of John Gasper, loaning defendants $413.15 with interest at 5 percent per annum, to be paid in monthly installments of $10 until the debt was paid. As security for the loan the defendants executed and delivered to the plaintiff a second mortgage on the property. Under the terms of this mortgage the

defendants were in default, and the plaintiff instituted this suit.

The plaintiff's petition to foreclose his mortgage was filed April 20, 1951. Summons was issued April 20, 1951, and returned April 25, 1951. Service was had on defendants as provided for by law. The defendants failed to plead or answer as required and their default was taken. On June 11, 1951, decree of foreclosure was entered in the amount of $273.54. Order of sale was issued July 3, 1951. On August 14, 1951, sale was had and the property bid in by the plaintiff in the amount of $315. On August 15, 1951, plaintiff moved to confirm the sale, and sale was confirmed, sheriff's deed issued to plaintiff, and a writ of assistance issued. The defendants' application to vacate the judgment was filed September 6, 1951.

The application, insofar as necessary to consider, alleged that the defendants paid until the original debt to Prudential was reduced to $7,462.25, and paid interest as required, and until the plaintiff's debt was reduced to $264.63. The application also alleged the price for which the property was sold was so inadequate as to shock the conscience of the court. Defendants further alleged expenditures on their part in the amount of $411 to improve the property.

On September 26, 1951, the plaintiff filed a motion to dismiss the defendants' application, setting forth the regularity of the mortgage foreclosure proceedings, the indebtedness owing by defendants to plaintiff, and the amount of the Prudential mortgage which the plaintiff would be obligated to pay, a total of $7,960.63, the reasonable value of the property at the time the sale was confirmed, and prayed dismissal of the defendants' application.

The defendants produced evidence by witnesses engaged in the real estate business and familiar with the market value of property of this type fixing the value of defendants' property between $11,000 and $11,500,

which would leave an equity claimed by the defendants in excess of $2,400. John Gasper testified for plaintiff that the reasonable market value of the property would be $9,000.

The May term of court adjourned on September 29, 1951. On November 26, 1951, hearing was had on the defendants' application to set aside the judgment. The trial court sustained the same, and in its order granted the defendants 30 days to pay into court the sum of $682.30 for the benefit of the plaintiff. The order of November 26, 1951, in addition to sustaining the defendants' application also, in effect, overruled the plaintiff's motion to dismiss the defendants' application to set aside the judgment. On December 3, 1951, the defendants tendered into the court the sum of $682.30, as required by the order of November 26, 1951.

The defendants do not contend that their application to set aside the judgment is based on fraud or perjury, nor is it considered by defendants in the nature of a motion for new trial.

The plaintiff assigns as error that the trial court erred in finding it had the power to sustain the defendants' application to set aside the judgment.

The only question presented for determination is the power of the district court to vacate a judgment after the term of court at which it was entered has adjourned.

In this jurisdiction the law is established that courts of general jurisdiction possess inherent power to vacate or modify their own judgments at any time during the term at which they were pronounced. See, Bradley v. Slater, 58 Neb. 554, 78 N. W. 1069; Lyman v. Dunn, 125 Neb. 770, 252 N. W. 197.

After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited in what is now Chapter 25, article 20, R. R. S. 1943, § 25-2001, contained therein. See, Lyman v. Dunn, *supra;* Cronkle-

ton v. Lane, 130 Neb. 17, 263 N. W. 388; State v. State Journal Co., 77 Neb. 771, 111 N. W. 118; Schuyler Building and Loan Assn. v. Fulmer, 61 Neb. 68, 84 N. W. 609; Feldt v. Wanek, 134 Neb. 334, 278 N. W. 557.

No contention is made by the defendants that they were entitled to a new trial within the time and in the manner prescribed in sections 25-1143 and 25-1145, R. R. S. 1943, as provided by subdivision (1) of section 25-2001, R. R. S. 1943. In any event, we conclude that no such reasons were appropriately set forth in the defendants' application to vacate the judgment in the foreclosure proceedings, and apparently nothing is stated in the defendants' application to show any grounds for vacating the judgment after the term as appears in section 25-2001, R. R. S. 1943. See, Shipley v. McNeel, 149 Neb. 793, 32 N. W. 2d 636; Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

For the reasons given herein, the judgment of the district court is reversed and the cause remanded with directions to set aside the order of November 26, 1951, and to reinstate the judgments and proceedings vacated by that order.

REVERSED AND REMANDED WITH DIRECTIONS.

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ELWIN MURRAY, A MINOR, BY LOUIS MURRAY, HIS FATHER AND NATURAL GUARDIAN AND NEXT FRIEND, APPELLEE, V. PEARSON APPLIANCE STORE ET AL., APPELLANTS.
54 N. W. 2d 250

Filed June 20, 1952. No. 33012.

1. **Negligence.** Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances.
2. **Automobiles: Negligence.** The existence or presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care com-

mensurate with such surrounding circumstances.

3. **Negligence.** Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.
4. **Automobiles: Negligence.** The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance.
5. ———: ———. As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.
6. **Negligence.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
7. ———. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.
8. **Damages.** Where there are elements of damage, such as expenditures, capable of pecuniary measurement, the law requires the amount shall be proved.
9. **Negligence.** If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect.
10. ———. Under the comparative negligence law, section 25-1151, R. R. S. 1943, the words "slight" and "gross" as therein used are comparative terms and the intent of the statute is that the negligence of the parties will be compared one with the other in determining questions of slight and gross negligence.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Reversed and remanded.*

*Maupin & Dent*, for appellants.

*V. H. Halligan*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Elwin Murray, a minor, by Louis Murray, his father and natural guardian and next friend, brought this action in the district court for Lincoln County against Pearson Appliance Store, Herbert R. Pearson, and Rollo Harvey. The purpose of the action is to recover for personal injuries and property damage suffered in a truck-car accident. The basis for recovery is that defendant Harvey was negligent in operating a truck owned by defendant Pearson, who is doing business under the trade name of Pearson Appliance Store, and that such negligence was the proximate cause of the accident which resulted in plaintiff's damages. By the time the action was tried the plaintiff had reached maturity and the case proceeded to trial in his name. The jury returned a verdict for the plaintiff on both counts. An alternative motion for either a judgment notwithstanding a verdict or for a new trial was filed and overruled and judgment entered on the verdict. The defendants appeal therefrom.

Appellants contend their motion for a judgment notwithstanding the verdict should have been sustained for the reason that appellee's evidence shows he was guilty of contributory negligence which was more than slight and sufficient, as a matter of law, to defeat his right to recover.

In this respect we have said: "When the court can say, as a matter of law, that the plaintiff is guilty of negligence that is more than slight as compared with that of the defendant and that such negligence is a proximate cause of the accident then the court should direct a verdict for the defendant and dismiss the action." Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106.

The evidence is not in dispute as to the following:

Appellant Pearson operated a store in Wallace, Nebraska, under the trade name of Pearson Appliance Store. While this business was primarily engaged in selling electrical appliances and machines it also sold propane gas. For the purpose of delivering this latter product Pearson owned and operated a two-ton Studebaker truck with a bulk propane gas tank. Pearson had in his employ the appellant Harvey and Wilbur Owens. They operated the store in Wallace.

Appellee, Elwin Murray, lived in Wallace and was engaged in farming and ranching with his father. Their operations were located some three miles east and one-half mile south of Wallace and their livestock consisted of some 45 head of cattle. Appellee was in sole charge of this livestock at the time of the accident as his father was at that time in California. There was no one staying at the place where these cattle were being kept. The cattle consisted mostly of stock cows but did include a few milk cows. Appellee owned a 1947 Studebaker five-passenger coupé which he used in going to and from the place where the cattle were kept.

Dickens, Nebraska, is some nine or ten miles east of Wallace and located on Highway No. 23, which is a graded and graveled road. About 9 p. m. on Sunday evening, January 2, 1949, snow began to fall at Wallace. By Monday morning it had become a blizzard. Early that morning, about 2 a. m., a customer near Dickens called the Pearson Appliance Store and asked them to deliver some propane gas. This Harvey and Owens attempted to do. They used the Studebaker truck for this purpose and put chains on the rear dual wheels before starting. When loaded this truck weighs between six and seven tons. They left Wallace about 8 a. m. but after getting within about three miles of Dickens the weather conditions caused them to turn around and return to Wallace. The wind was blowing from the northeast. On their return, at a point about one-half mile south and one and one-half miles east of Wallace

on Highway No. 23, just as the truck was coming out of a snowdrift which was across the highway, the truck collided with appellee's coupé. The accident happened about the middle of the forenoon.

Appellee, on Monday morning, because of the weather conditions, decided to go out and look after the livestock he and his father owned. He used his car for that purpose. He first went south one-half mile and then turned east on Highway No. 23. After he had gone east about a mile and a half his coupé collided with the Pearson truck, the left-front wheel and fender of the car striking the left-front wheel and fender of the truck. After the collision the car was standing upright, but at an angle, on the south edge of the highway. It was partly in the ditch. Its left-front wheel was on the graded and graveled surface, its right-front wheel was off the graded and graveled surface, but on the shoulder, and its rear wheels were in the ditch. At this point the slope of the shoulder into the ditch is very gradual.

Appellee testified that he was driving his coupé without chains; that he was familiar with the road, having driven it many times; that while driving south out of Wallace for a distance of a half mile he had some visibility; that after turning east on Highway No. 23 his visibility was zero; that he could not see ahead; that he put his car in low and drove about five miles an hour; that, in order to be able to proceed, he rolled down the glass in the right door of his coupé, sat on the right side of the front seat which was wide enough for three people, and put his head out of the opening in the door and looked down to see the edge of the gravel; that he guided the car by aligning it with the edge thereof, keeping it about a foot and a half therefrom; that some 100 to 150 yards from the place of the accident there was some snow drifted across the road; that just before the accident he heard his tires starting to creak like they might be rolling into a snowdrift; that

he thereupon pulled his head into the car and started to put on the brakes; that the impact occurred; that the impact occurred after he had traveled east about a mile and a half; that at the place of impact the road was straight and level; that he never saw the truck before the impact; that his head went through the right front of his windshield; that his car was at all times on the right side of the center of the graveled and graded portion of the road; that after the impact the truck was right in front of him; and that before it could go forward it had to back up a little to get around the front end of his car.

Appellant Harvey, who was driving the truck, and his fellow employee Owens, who was riding with him, testified that after they turned around to return to Wallace they had some visibility as they were traveling with the storm; that as they approached a point just east of where the accident occurred they came to snow that was drifted across the highway; that this snow had drifted as deep as two and one-half feet; that in an endeavor to get through this snow they put the truck in compound underdrive which did not permit a speed in excess of five miles an hour; that while trying to get through this drift they had no visibility; that while driving through the drift they did not know where the truck was with reference to the center of the road; that on the third effort they broke through the drift; that just as they broke through the drift their vision improved a little and they saw appellee's car coming toward them; that it was some 15 to 20 feet away; that they saw it in the glare of their lights, which were turned on; that the car did not have its lights burning; that the windshield of the car was completely covered with frost, ice, and snow; that Harvey hit the brakes and endeavored to turn right; that he could not turn right because they were still in the snow, the front wheels in eight or ten inches thereof and the rear wheels in the deeper part of the drift; that the impact

occurred almost immediately; that the truck stopped almost immediately, moving forward only a foot or two; that the car rebounded from the impact and went back in sort of a semicircle or arc, ending up almost off the graded and graveled portion of the road; that the car and truck were between 15 and 25 feet apart after the collision; that the truck was north of the center of the road when it came to rest; that Harvey drove it straight forward alongside the car to pick up appellee and take him to Wallace; and that the truck had been north of the center of the graded and graveled portion of the highway.

The facts of this case do not present an emergency situation where either party was caught out in a storm and was endeavoring to get to shelter. Both parties drove out into it. Each had the right to do so but, of course, if negligent while doing so each will be held responsible for his own conduct. As stated in Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569: " 'Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances.' McClelland v. Interstate Transit Lines, supra. See, also, Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491; Lammers v. Carstensen, 109 Neb. 475, 191 N. W. 670."

In this respect we have said: "On principle it would appear that the existence or presence of smoke, snow, fog, mist, blinding headlights or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances. Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825; Fischer v. Megan, 138 Neb. 420, 293 N. W. 287." Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315.

" '* * * where the vision of the driver of an auto-

mobile is obscured whether by the lights of an approaching car, fog, smoke or for any other reason, it is his duty to stop until visibility is restored, or to reduce his speed and have his car under such control that he can stop immediately if necessary. French v. Nelson, 111 Vt. 386, 391, 17 A. 2d 323; Powers v. Lackey, 109 Vt. 505, 507, 1 A. 2d 693; Palmer v. Marceille, 106 Vt. 500, 508, 175 A. 31; Steele v. Fuller, 104 Vt. 303, 311, 312, 158 A. 666.'" Price v. State Highway Commission, 62 Wyo. 385, 167 P. 2d 309, quoting from Taylor v. Quesnel, 113 Vt. 36, 29 A. 2d 812.

Negligence has been defined: "'Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.' McGraw v. Chicago, R. I. & P. R. Co., 59 Neb. 397, 81 N. W. 306." McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384.

The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance.

As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. See, Buresh v. George, *supra;* Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885.

The basis for this rule is stated in Buresh v. George, *supra,* as follows: "The basis of this rule is that a driver of an automobile is legally obligated to keep

such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it."

Under these principles the appellee was undoubtedly guilty of negligence in driving his car but negligence alone is not sufficient to prevent recovery. It must contribute to the injury complained of as a proximate cause. This principle is stated in Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394: "Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause."

" ' "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." Spratlen v. Ish, 100 Neb. 844, 161 N. W. 573. See, also, Williams v. Hines, 109 Neb. 11, 189 N. W. 623, and Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117.' Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501. See, also, Bixby v. Ayers, supra; Johnson v. Mallory, 123 Neb. 706, 243 N. W. 872." Stark v. Turner, *supra*.

There is evidence from which a jury could find that appellee's car was at all times being driven on the right-hand side of the highway and that the accident happened there. If that is true then if the truck had been on its right side of the highway the accident would not have happened. Under such circumstances it would appear that the negligence of appellee in driving blind would not necessarily have been a proximate cause of the injury.

We realize that several jurisdictions have held to the

contrary and have said that blind driving prevents recovery no matter how the accident happens although some of these cases are clearly distinguishable from this case by reason of a material difference in the facts on which the conclusion is based. However, we think to say such is true in every case would be an improper application of the principle of contributory negligence. If it can be said, without question, that the accident happened because thereof then it presents a question of law for the court but otherwise one of fact for the jury. We think the latter is true here. See Crowe v. O'Rourke, 146 Wash. 74, 262 P. 136.

As stated in Baden v. Globe Indemnity Co. (La.), 146 S. 784:

"The evidence, in our opinion, preponderates in favor of the contention that the Johnson car was on its proper side of the road, and that the Baden car was at least partly on Johnson's side of the road.

"In view of these conditions, the rate of speed of the Johnson car and the absence of lights therefrom, or inefficient lights thereon, cease to be of primary importance to a correct determination of the question of responsibility for the accident, for certainly there would have been no collision, notwithstanding the negligence on part of Johnson, had the Baden car, equipped with bright lights, maintained its side of the highway. The efficient and proximate cause of the accident was the contributing negligence of Baden in failing to observe his own duty at the time."

Appellants contend the court erred when it included in its instruction on what the jury could consider in assessing the amount of damages the following: "The measure of damage for personal injuries is that amount which will fairly and reasonably compensate plaintiff for * * * reasonable medical or other expense incurred on account of said injuries." This contention is based on the fact that appellee introduced no evidence as to

the amount of such expenses incurred or the reasonable value thereof.

In his petition appellee alleged: "* * * plaintiff has suffered doctors', hospital and medical expenses and personal injury totaling the sum of Five Thousand Dollars * * *."

The evidence introduced shows in detail the appellee's need for medical care and hospital attention because of the injuries he received in the accident and that such services were rendered and the extent thereof but no evidence was introduced to show any amount of liability appellee had incurred by reason thereof nor to show the reasonable value thereof. In other words, if the jury included any amount for medical or other expenses incurred on account of the injuries suffered it would have had to have based its decision on speculation or guess as there is nothing in the evidence on which it could base it.

" 'Where there are elements of damage, such as expenditures, capable of pecuniary measurement, the law requires the amount shall be proved.' " Library Board v. Ohlsen, 110 Neb. 146, 193 N. W. 110, quoting from North Chicago Street R. R. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. 483.

The following discussion found in Reed v. C., R. I. & P. R. Co., 57 Iowa 23, 10 N. W. 285, is applicable here. Therein the court, in discussing a similar problem, said: "The court directed the jury that if they found that plaintiff was entitled to recover, they should among other damages allow for 'expenses reasonably incurred for medical care and attention.' Of course upon proper evidence showing the amount, or proximate amount, of these expenses, plaintiff would be entitled to recover them. But there is not one word in the evidence upon which an estimate can be based of their amount. The testimony shows that plaintiff was treated by a physician three or four times and that he procured medicine for his injuries. The value of these medical services and

medicines are not attempted to be shown in any manner and their extent and character are no more definitely shown in the testimony than in the statement we have just made. Under the instruction in question the jury were directed to include compensation for medical services in their verdict. They doubtless would feel authorized to determine the amount to be allowed therefor according to their own judgment without aid of evidence. But the law cannot be administered in this uncertain way. Damages of this kind cannot be found by the jury except upon proof. It will not do to say that the amount of damages allowed by the jury may have been small. We can know nothing about the amount and if we could know it to be insignificant, we could not relieve this case from the operation of the familiar rules of law which require damages of the character of those under consideration to be established by proof. For the error pointed out the judgment of the District Court must be REVERSED."

When the question has come up the courts seem to be uniform in so holding. See, Hobbs v. City of Marion, 123 Iowa 726, 99 N. W. 577; Cousins v. Lake Shore & M. S. Ry. Co., 96 Mich. 386, 56 N. W. 14; Little Rock & M. R. R. Co. v. Barry, 58 Ark. 198, 23 S. W. 1097, 25 L. R. A. 386; Gibler v. Terminal R. R. Assn., 203 Mo. 208, 101 S. W. 37; Smith v. Whittlesey, 79 Conn. 189, 63 A. 1085; Chicago, St. L. & P. R. R. Co. v. Butler, 10 Ind. App. 244, 38 N. E. 1; Consolidated Arizona Smelting Co. v. Egich, 22 Ariz. 543, 199 P. 132; Olson v. Erickson, 53 Wash. 458, 102 P. 400; Brown v. White, 202 Pa. 297, 51 A. 962, 58 L. R. A. 321; Willis v. Barber, 280 Ky. 417, 133 S. W. 2d 551.

Appellants complain of instruction No. 4 given by the court and contend it is erroneous in several respects. We will therefore set out the instruction in full. It is as follows:

"If you find from the evidence that defendants' negligence was the proximate cause of injury to the person or

property of the plaintiff, you will next consider the affirmative defense that plaintiff's own negligence formed a part of the proximate cause of said collision. The burden of proof is upon the defendants to prove the material allegations of such defense. Such material allegations are stated to you in three propositions, to-wit:

"(1) That at the time of or immediately prior to said collision, the plaintiff was negligent in one or more of the following respects:

"(a) That he negligently drove on the left-hand side of said highway.

"(b) That he negligently failed to maintain a proper lookout for other vehicles.

"(c) That he negligently failed to maintain proper control over the operation of his vehicle.

"(2) That such negligent act or omission formed such a part of the proximate cause of said collision that said collision would not have occurred but for such negligent act or omission.

"(3) That after weighing and comparing the negligence of each party with that of the other, you find either one of the following statements to be true:

"(a) That the negligence of plaintiff was more than slight in comparison with the negligence of defendants.

"(b) That the negligence of defendants was less than gross in comparison with the negligence of plaintiff.

"If you are satisfied by a preponderance of the evidence that each and all of the foregoing propositions are true, you will find for the defendants and so state in your verdict.

"If the evidence is evenly balanced or preponderates in favor of the falsity of any one of said three propositions, you will find against the defendants upon their affirmative defense and proceed to compute the amount of damage suffered by the plaintiff.

"If you should find Propositions 1 and 2 of this instruction in favor of defendants, but Proposition 3 against defendants, you will bear in mind the compar-

ison made by you and apply the same to the computation of damages as you are hereinafter instructed."

Appellants complain of this instruction because it did not properly submit the defendants' burden of proving contributory negligence. They claim the instruction should have been so worded as to give them the benefit of appellee's evidence.

The rule in this regard is as follows: "If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect." Mundy v. Davis, *supra.* See, also, Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839.

It will be noted the instruction submitted the issue of contributory negligence in the following language: "The burden of proof is upon the defendants to prove the material allegations of such defense." While appellee testified that he drove his car on the right side of the road at all times there are facts and circumstances in his evidence which the jury could properly consider in deciding the question of whether or not appellee was actually guilty of contributory negligence. The appellants were entitled to an instruction on this issue which would give them the benefit thereof.

Appellants further complain because they feel this instruction places on them too great a burden by requiring them to prove all of the alleged grounds of negligence of which they complain the appellee is guilty. We do not think the instruction has that effect. It is true that this instruction provides that appellants must establish, by a preponderance of the evidence, that "each and all of the foregoing propositions are true," but this language does not refer to the separate acts of negligence of which appellants complain the appellee is

guilty. It refers to the three propositions contained in the instruction which are negligence, proximate cause, and comparative negligence. The language in this instruction actually referable to the separate acts of negligence complained of is found in proposition "(1)." It is as follows: "That * * * the plaintiff was negligent in one or more of the following respects: * * *." We think this language properly submitted this phase of the issue of contributory negligence.

Appellants' next complaint is that proposition "(3)", contained in this instruction, did not correctly submit the doctrine of comparative negligence. They contend it is not a proper statement thereof.

The rule is: If plaintiff is guilty of negligence directly contributing to the injury he cannot recover, even though defendant was negligent, unless his contributory negligence is slight and the negligence of defendant is gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery.

When plaintiff is entitled to recover under this rule it then becomes the duty of the jury to deduct from the total amount of any damages which it determines he has sustained such an amount as his contributory negligence bears to the entire negligence of the parties which contributed thereto. Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158, as clarified by Sgroi v. Yellow Cab & Baggage Co., Inc., 124 Neb. 525, 247 N. W. 355; Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704.

"Under the comparative negligence law, section 25-1151, R. S. 1943, the words 'slight' and 'gross' as therein used are comparative terms and the intent of the statute

is that the negligence of the parties will be compared one with the other in determining questions of slight and gross negligence." Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799.

We think this instruction is confusing because it places a burden of proof on the appellants with reference to the making of such comparison. After the parties establish and the jury, under proper instructions, finds the respective parties guilty of actionable negligence and contributory negligence the responsibility is then on the jury to make the comparison as contemplated by the statute. This comparison is to determine the rights of the parties to recover, if at all, and the extent thereof. In this respect there is no burden of proof on either party but solely a duty on the part of the jury to make the proper comparisons on the evidence before them. The court should give the jury an instruction in which the correct basis for making the comparison is set forth.

In view of what has been said a new trial should have been granted. We therefore vacate and set aside the verdict and judgment of the trial court and grant a new trial.

REVERSED AND REMANDED.

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DAROLD E. BUSSELL ET AL., APPELLANTS, V. CLIFTON MCCLELLAN ET AL., APPELLEES.
54 N. W. 2d 81

Filed June 20, 1952. No. 33142.

1. **Waters.** The grant of section 31-201, R. S. 1943, is limited to the owner of the land whereon the open ditch or tile drain may be discharged into a natural watercourse or natural depression or draw.
2. **Appeal and Error.** This being an action in equity it is the duty of this court to consider it de novo.
3. **Waters.** Surface waters are a common enemy and a proprietor of real estate may fight them as he deems best, however, in fighting them an upper proprietor may not accumulate them into

a ditch or drain and increase the flow and discharge them in volume on a lower or servient estate or divert them in a different direction to the damage of the lower or servient estate.

4. ———. Where surface water flows in a well-defined course, whether the course be ditch, swale, or drain in its primitive condition, the flow cannot be arrested or interfered with to the injury of neighboring proprietors.
5. Negligence. Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances.
6. Injunctions. Injunction is the appropriate remedy for the protection of plaintiffs' rights herein.

APPEAL from the district court for Greeley County: WILLIAM F. SPIKES, JUDGE. *Reversed and remanded with directions.*

*P. J. Barrett,* and *Blackledge & Sidner,* for appellants.

*Kirkpatrick & Dougherty,* and *Davis & Vogeltanz,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action in equity by Darold E. Bussell and Esther M. Bussell, plaintiffs and appellants, to enjoin Clifton McClelland, Merrill McClelland, Arnold Malottke, Wilber Fuss, Dean Fuss, Rose Fuss, and John Doe, operator of a dragline, real name unknown, defendants and appellees, from the construction of ditches which drain certain lands onto the lands of plaintiffs to their injury and damage. Issues were joined and a trial was had to the court at the conclusion of which a decree was entered denying the relief prayed for in the petition of plaintiffs. From this decree plaintiffs have appealed.

The true name of the party designated as John Doe was found to be Claussen, Olson & Benner, Inc., and as such it is designated in the decree. This party owned

no land involved. It was the owner of a dragline and was employed by the other defendants or some of them to construct the ditches of which plaintiffs complain. The true name of the defendants designated as McClelland was found to be McClellan and they will be hereinafter so referred to. The defendants other than Claussen, Olson & Benner, Inc., were landowners charged by plaintiffs with a joint purpose to construct ditches and collect waters with the end that they would be caused to flow upon plaintiffs' land to their damage.

The plaintiffs are the owners of land in Sections 5 and 6 in Township 17 North, Range 12 West of the 6th P. M., in Greeley County, Nebraska. This land is bounded on the east by the North Loup River. The northern boundary is of no importance in this case. On the west it is bounded by lands of the defendant Malottke. The Malottke lands extend west and northwest from plaintiffs' west line. The west line of the Malottke land is a county line road between Greeley and Valley Counties. To the west of the Malottke land is land belonging to the defendants McClellan. The north line of this land is an extension westward of the north line of the Malottke land. The land below the south line of the western part of plaintiffs' land and the land immediately to the south of this line extended westward to the county line road mentioned is owned by the defendants Fuss.

A completely accurate description of the lands involved herein cannot be given since no such description is found in the record.

Paralleling each other and extending from about the northwest corner of plaintiffs' land diagonally to the southeast are a track of the Union Pacific Railroad and a state highway. The highway is to the west of the railroad. There is a constructed outlet for flow of water under these. This outlet is on plaintiffs' land a considerable distance north of the south line. Water flows from this point in a meandering course eastward into the North Loup River.

The natural flow of surface water is from the McClellan land south and east onto the Malottke land and the natural flow from the Malottke land is south and east to the approximate south side thereof and thence east onto the plaintiffs' land. The natural flow from a part of the Fuss land is north and east to the approximate north line where it joins the water on the Malottke land and flows thence east onto plaintiffs' land.

It is undisputed that up to the time the waters reach a point very close to the east line of the Malottke land they are completely diffused surface waters and at no point or points do they follow a fixed line of flow, draw, depression, or any kind or nature of channel.

To expedite the flow of these surface waters with a common purpose and in furtherance thereof the defendant landowners caused a ditch to be constructed starting about 300 feet west of and extending eastward to the county line road. This ditch is parallel with and at about the south line of the McClellan land. They also caused to be constructed east of the highway a ditch extending from the east side of the road to a point about 300 feet west of the southwest corner of plaintiffs' land. The dimensions of the channel are not definite. There is testimony that its depth is as much as 5 feet, its width at the base 18 feet, and its bank width about 66 feet. Extension further eastward was stopped by restraining order issued out of the district court. The purpose of the defendants was not to stop at this point but to continue eastward to a point on the Malottke land near the line between it and plaintiffs' land where they contend there is a depression or draw which extends on and over plaintiffs' land eventually leading into the North Loup River. The purpose of the ditches was to collect the surface water from the land of the defendants therein and to facilitate the flow thereof into this claimed draw or depression starting on Malottke's land and extending over plaintiffs' land to the river.

The defendants contend that they have a right so to

do under the terms of sections 31-201 and 31-202, R. S. 1943. These sections of the statute are as follows:

"Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation." § 31-201, R. S. 1943.

"Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." § 31-202, R. S. 1943.

It is to be observed that in these provisions a watercourse is defined, but a depression or draw is not. If the point of the contemplated ending of the ditch on the Malottke land would not provide an opening into a watercourse as defined by statute, or a depression or draw properly defined, it follows of course that the construction of the ditch to the damage of plaintiffs would be unlawful.

Whether or not however the contemplated eastern end of this ditch on the Malottke land would empty into a watercourse as defined or a depression or draw which is not defined is not a matter for first consideration herein on the issues made by the pleadings and tried by the district court.

The petition pleaded a combined and concerted purpose of all of the landowner defendants to cause the surface water from all of their lands in the watershed to be collected on the McClellan and Malottke lands and to be carried in concentration in increased volume and force onto and over plaintiffs' lands. The defendants by their answer and by their evidence responded to this charge against them and asserted the right to pursue the alleged combined and concerted purpose. There is

no pleading the effect of which was to say that Malottke had the right alone thus to ditch and drain his land individually.

The defendants presented their defense on the assumption that Malottke did have that right, and with that assumption as a basis proceeded on the theory that all landowners back of the Malottke land and within the watershed had the right to have their surface water collected in ditches and carried onto and over the Malottke land and thence onto and over the plaintiffs' land through what they contended was a watercourse thereon but which the district court found was not a watercourse but a depression or draw leading to a watercourse.

The question for first consideration therefore is that of whether or not, assuming that Malottke had authority under the statute and the conditions existing to construct the ditch on his own land, the landowners back of him in the watershed had the right under the statute to have accumulated and concentrated with his their surface water and to have it all in accumulation and concentration carried onto and over plaintiffs' lands to plaintiffs' damage.

The last clause of section 31-201, R. S. 1943, appears to be a full and complete answer to the question. Repeating here, it is as follows: "* * * and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation."

The section clearly means as it clearly says that in order that there shall be no liability in damages for the construction of a ditch or drain such as is authorized by the statute the ditch or drain must be "wholly" on the owner's land and the water collected therein must be discharged in a natural watercourse or natural depression or draw on the owner's land.

Conclusively no water from the McClellan or Fuss lands ever did or could drain into a natural watercourse or natural depression or draw thereon. None existed. The design was to cause them to be collected in the

ditch on the McClellan land which was closed at the east end and when the ditch was filled to capacity have them spill therefrom eastward over the county line road, thence into the ditch on the Malottke land, and thence onto and over plaintiffs' land to the river.

As to whether or not this would result in damage to the land and crops of plaintiffs there is sharp conflict in the evidence. The evidence of the defendants in this respect is largely conjectural and speculative. The evidence of plaintiffs is also in part conjectural and speculative, however some of it is definitive of results which have already flowed from the incompleted project.

Considered de novo (§ 25-1925, R. R. S. 1943; Byram v. Thompson, 154 Neb. 756, 49 N. W. 2d 628) as must be true in this equity case we are convinced that this project in its incompleted condition has already caused and if it is completed will cause the flow of water to be concentrated and increased onto and over the lands of plaintiffs to the damage of the lands and crops thereon.

In this light and in the light of a lack of statutory authority which is the only authority advanced by the defendants as a basis for their project it follows that the rights of the parties are determinable under the established general rules relating to the collection of surface waters and the discharge thereof on the lands of a lower proprietor.

This court, in Hengelfelt v. Ehrmann, 141 Neb. 322, 3 N. W. 2d 576, recognized the common law rule that surface water is a common enemy and that a proprietor of real estate may fight it as he deems best, but an exception as follows was pointed out: "* * * that in fighting surface water the upper proprietor may not accumulate surface waters into a ditch, or drain, and thereby increase the flow, and discharge them in volume on the servient estate, and cannot divert them so they go in a different direction."

In Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129,

it was said: "A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow."

It was also said: "Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors." This latter quotation was repeated in McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912.

In Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732, it was said: "Water which appears upon the surface of the ground in a diffused state with no permanent source of supply or regular course is regarded as surface water."

It was also said: "In this jurisdiction it is a general rule that surface waters may be controlled by the owner of the land on which they fall, or originate, or over which they flow and he may refuse to receive any that falls, or originates, or flows on or over adjoining land. His right in this respect however must be so exercised as not to unnecessarily or negligently cause injury to the rights and property of others."

Under these rules each of the landowners in the watershed above the lands of plaintiffs had a right in his turn to exercise control of surface waters on and in passage over his own land. However in the exercise of that control he was required to do so without negligence, without collecting it and discharging it in volume on the lower estate, and without diverting it from the course of natural flow to the damage of the lower estate. Of course what one could not legally do a group could not in concert legally do.

It may not be said with certainty in the present instance, within the meaning of law relating to rights with reference to surface water, that there was diver-

sion. It may however be said with certainty that there was a collection and discharge of water in volume on the property of plaintiffs. The acts involved were committed in disregard of the rights of plaintiffs and the duty which the defendants owed to them. The acts must be regarded as negligence within the proper definition of that term.

This court has defined negligence as the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances. Bohmont v. Moore, 138 Neb. 784, 295 N. W. 419, 133 A. L. R. 270.

The appropriate remedy for the protection of plaintiffs against the evils of which they complain is by injunction. Schomberg v. Kuther, *supra.*

The decree is reversed and the cause remanded with directions to the district court to render a decree in favor of plaintiffs and against the defendants in conformity with the prayer of the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

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HARRY GREATHOUSE ET AL., APPELLEES, V. DIX RURAL HIGH SCHOOL DISTRICT, OF KIMBALL COUNTY, NEBRASKA, APPELLANT.

54 N. W. 2d 58

Filed June 20, 1952. No. 33150.

1. **Schools and School Districts: Elections.** Section 10-702, R. S. Supp., 1949, requires 55 percent of all the qualified electors of a school district voting in favor of the issuance of bonds for the purpose of building a new school building and securing the necessary furniture and apparatus for the same.
2. **Elections.** It is the policy of the law to prevent the dis-

franchisement of qualified electors who have cast their ballots in good faith by requiring only a substantial compliance with the election laws of the state.

3. ———. On the trial of a contested election ballots will not be treated as void simply because of irregular or unauthorized markings or mutilations which appear to have been innocently made as the result of awkwardness, inattention, mistake, or ignorance, if the lawful intent of the voter can be ascertained therefrom.

4. **Schools and School Districts: Elections.** Under section 10-702, R. S. Supp., 1949, requiring a proposal for the issuance of school bonds to be adopted by 55 percent of the ballots cast at the election by qualified electors of the school district on the question, ballots improperly cast or rejected for illegality cannot be counted in determining the vote cast.

5. ———: ———. In the absence of statutory provision to the contrary, ballots which have been cast in a school district election which are entitled by law to be counted in declaring the result of the election shall alone be counted in determining the vote cast.

APPEAL from the district court for Kimball County: JOHN H. KUNS, JUDGE. *Affirmed.*

*Heaton & Connors*, for appellant.

*Torgeson, Halcomb & O'Brien*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action involving a contest of a special election, the object and purpose of the election being to authorize Dix Rural High School District to issue negotiable bonds in the principal amount of $53,000 to build a new school building and secure the necessary furniture and apparatus for the same.

Section 10-702, R. S. Supp., 1949, provides: "No bonds shall be issued until the question has been submitted to the qualified electors of the district, and fifty-five per cent of all the qualified electors voting on the question shall have voted in favor of issuing the same, at an election called for the purpose, upon notice given by the

officers of the district at least twenty days prior to such election."

One or more of the contestants is competent to contest the election.

The special election held on June 2, 1951, by defendant contestee was duly and legally called and the proposition legally submitted.

The trial court, in its decree, found generally in favor of the contestants, and particularly that the ballots cast at the election, designated in the record as exhibits Nos. 4, 5, 6, 7, 8, and 9, purportedly cast as absentee or disabled voters ballots, were not cast in compliance with the law; that these ballots were by the canvassing board of the contestee counted as "yes" votes but in fact said ballots should not have been counted; that the votes cast by Winnie Peterson and Wayne Bailey were "yes" votes on the proposition submitted and should not have been received and counted because such persons were not legally qualified electors of the contestee school district at the election held June 2, 1951; that the ballots identified as exhibits Nos. 2 and 3 were considered by the election board and the canvassing board of contestee as spoiled ballots and were rejected and not counted; that such ballots should have been counted as "no" votes; that 55 percent of the qualified electors of the Dix Rural High School District voting on the question submitted did not vote in favor of the proposition submitted; that Clyde Acheson and Olive Bailey who did vote were not legally qualified electors but there was not sufficient credible evidence to show how they voted; and ordered and adjudged that the election be annulled.

Judgment was entered on the findings. The contestee's motion for new trial was overruled, and contestee perfected appeal to this court.

For convenience we will refer to the plaintiff appellees as contestants, and the defendant school district appellant, as contestee.

Winnie Catherine Peterson testified in behalf of the contestants that she had lived in Dix, apparently referred to as Dix City, since 1910. She had no children of school age, did not own real estate in the Dix Rural High School District, did not receive a tax assessment for the year 1950, filed no personal tax schedule for the year 1950, but did file a personal tax schedule for the year 1951. She voted at the special election June 2, 1951.

Olive Isabel Bailey, in behalf of the contestants, testified that she was living in Dix on June 2, 1951; that she and her husband had moved their furniture to Dix about May 1, 1951, and they came to Dix later; and that prior to that time she and her husband resided on the Herb Linn farm which is not in the Dix Rural High School District. They lived there a year before returning to Dix. Their children attended grade school district No. 4, which is not in the Dix Rural High School District. She did not remember whether they were assessed in Dix for taxes or not. They owned a home in Dix, went to work for Herb Linn, and in the interim rented their home. Upon inquiry by the court she testified that they operated a farm owned by Herb Linn on a salary basis, could stay there as long as they wanted to, and had no special arrangements to return to Dix. She informed the court she voted at the special election on June 2, 1951.

Her husband, Wayne Bailey, testified that he and his wife lived on the Herb Linn place for about a year and moved to Dix on May 6, 1951. He did not know that this farm and the improvements thereon were not in the Dix Rural High School District when he voted at the election held on June 2, 1951. He thought he was qualified to vote on the proposition.

Clyde Acheson testified in behalf of the contestants that he had lived in Dix for more than two years; that he lived with his father and did not own any real estate in the Dix Rural High School District, nor did he own any personal property therein. He had no property that

was assessed in 1950 or 1951. He filed a personal tax schedule for the year 1951. Upon inquiry by the court he testified that he voted at the election of June 2, 1951.

The contestee assigns as error (1) that the evidence is insufficient to sustain the judgment of the trial court and is contrary to law; and (2) that the court erred in counting exhibits Nos. 2 and 3 as sufficient legal ballots.

The ballots and poll books, identified as exhibit No. 1, are in evidence.

Section 32-705, R. S. 1943, provides that the voter shall make a cross in the square to the left of the answer he wishes to give to the question submitted.

The following exhibits were identified, offered, and received in evidence without objection: Exhibit No. 2 is an official ballot which properly submitted the question to be voted on, with two squares or blocks with the word "yes" to the right of the top square or block, and the word "no" to the right of the lower square or block. The blank in the top square or block to the left of the word "yes" was completely filled in with blue pencil markings. The lower block to the left of the word "no" contained a cross.

Exhibit No. 3 is the same type of ballot. The block to the left of the word "yes" is filled in completely with blue pencil markings. To the right of the word "yes" is written in blue pencil the word "void." The block or square to the left of the word "no" contains a cross.

In Miller v. Mersch, 152 Neb. 746, 42 N. W. 2d 652, this court said: "It is the policy of the law to prevent the disfranchisement of qualified electors who have cast their ballots in good faith by requiring only a substantial compliance with the election laws of the state."

"On the trial of a contested election ballots will not be treated as void simply because of irregular or unauthorized markings or mutilations which appear to have been innocently made as the result of awkwardness, inattention, mistake or ignorance, if the lawful intent of the voter can be ascertained therefrom." Griffith v. Bona-

witz, 73 Neb. 622, 103 N. W. 327. See, also, State ex rel. Lanham v. Sheets, 119 Neb. 145, 227 N. W. 457; White v. Slama, 89 Neb. 65, 130 N. W. 978, Ann. Cas. 1912C 518; State ex rel. Waggoner v. Russell, 34 Neb. 116, 51 N. W. 465, 33 Am. S. R. 625, 15 L. R. A. 740; Deckert v. Hesch, 296 Ky. 176, 176 S. W. 2d 397; Allen v. Fuller, 332 Ill. 304, 163 N. E. 675; 29 C. J. S., Elections, § 182, p. 266.

It is obvious from the afore-cited authorities that the intention of the voter is the dominant factor to be determined from the ballot.

We have examined exhibits Nos. 2 and 3 carefully and find the intention of the voters casting the ballots to oppose the proposition submitted, and these ballots should have been counted as "no" votes.

Qualified electors to vote at a special election such as in the case at bar are every citizen of the United States (1) who has resided in the district forty days, (2) who is twenty-one years or more old, and (3) who owns real or personal property that was assessed in the district in his name at the last annual assessment, or whose spouse owns real or personal property that was assessed in the name of said spouse in the district at the last annual assessment, or who has children of school age residing in the district. § 79-427, R. R. S. 1943.

In Miller v. Mersch, *supra,* this court said: "While the cases are not in accord as to whether illegal, rejected, and blank ballots shall be counted in determining the total vote cast, we think the correct rule is, in the absence of statutory provisions to the contrary, that ballots which have been cast which are entitled by law to be counted in declaring the result of the election shall alone be counted in determining the vote cast. This simply means that ballots improperly cast, or rejected for illegality, or left wholly blank, are no part of the 'ballots cast at such election' within the meaning of section 79-616, R. S. 1943." For the purposes of this case this would be section 10-702, R. S. Supp., 1949.

The canvassing board for the Dix Rural High School District for the special election met on June 4, 1951, to canvass the vote and count the absentee and disabled ballots. Five absentee and one disabled ballots were opened and counted, all in favor of the proposition submitted. The board then resolved that 272 qualified electors voted, 152 in favor of the question submitted and 118 against it, and 2 ballots, identified as exhibits Nos. 2 and 3, were rejected as spoiled.

While the trial court's finding and judgment are not attacked in such respect, an examination of the record discloses sufficient compliance with the statute, Chapter 32, article 8, R. S. 1943, and the 1949 Supplement thereto, was not had, and the trial court correctly held the absentee ballots and disabled ballot to have been illegally cast and not proper to be counted at said election.

We find the ballots of Winnie Catherine Peterson and Wayne Bailey to be "yes" ballots, and the ballots of Olive Isabel Bailey and Clyde Acheson to be "no" ballots. It is apparent that these electors did not meet the qualification required of electors voting in an election such as the one in this case as clearly indicated by the statute previously summarized, and the trial court did not err in declaring these ballots to be illegal.

Applying the rule above stated in Miller v. Mersch, *supra*, and considering the results determined by the canvassing board wherein the board resolved 272 qualified electors voted, 152 voting in favor of the question submitted, it is apparent that 8 "yes" votes for the proposition submitted were illegal and should be deducted from the 152 votes which would leave 144 "yes" votes. It is unquestioned that 118 votes were "no" votes. We find that exhibits Nos. 2 and 3 should be counted as "no" votes, and therefore added to the 118 "no" votes which would make 120 "no" votes, against the proposition. It is also apparent that there are 2 "no" votes which were illegal, therefore, these 2 "no" votes should be deducted from the 120 "no" votes, leaving 118 "no"

votes, which, together with the 144 "yes" votes, constitute the 262 votes cast at the election by qualified electors. Therefore, the number of "yes" votes, for the proposition, would be less than 55 percent of the qualified electors voting on the proposition submitted, as required by law, and the proposition failed to carry.

We conclude the judgment of the trial court is right, and the same is hereby affirmed.

AFFIRMED.

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MARGARET DANIELSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
54 N. W. 2d 56

Filed June 20, 1952. No. 33168.

1. **Trial.** A trial court may properly refuse tendered instructions which are covered by instructions given on its own motion.
2. **New Trial: Appeal and Error.** An exception to a group of instructions collectively in a motion for a new trial shall be deemed for the purpose of review in this court as a separate exception to each instruction included within the group.
3. ———: ———. The exceptions taken to a group of instructions in a petition in error need be no more specific than required in a motion for a new trial.
4. **Criminal Law.** Proof of prior convictions under section 39-727, R. S. Supp., 1949, is properly made by offering in evidence the complaint or information, the judgment rendered on the verdict or plea of guilty, proof that the judgment has become final, and evidence that defendant is the same person presently before the court.
5. ———. Compliance with a sentence lawfully imposed is not essential to the proof of a prior conviction under section 39-727, R. S. Supp., 1949.

ERROR to the district court for Sarpy County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

*William N. Jamieson,* for plaintiff in error.

*Clarence S. Beck,* Attorney General, and *Bert L. Overcash,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

The defendant below was charged with operating a motor vehicle while under the influence of alcoholic liquor. It was further charged by proper averments that the crime constituted a third offense. The jury returned a verdict finding the defendant guilty and the trial court sentenced her to confinement in the State Reformatory for Women for a time of not less than one year nor more than fifteen months. The defendant appeals.

The evidence shows that during the evening of April 24, 1951, patrolman Stewart E. Halpin observed defendant driving a Dodge panel truck near Bellevue, Nebraska, in such a manner that he believed her to be intoxicated. Patrolman Halpin, being off duty, reported the incident to Jack Pfeffer, a police officer at Bellevue. Pfeffer, accompanied by Louis Lienemann, another police officer at Bellevue, drove out on State Highway No. 131 and found the Dodge truck in the ditch. The defendant was seated behind the steering wheel of the truck. The evidence of defendant's alleged intoxication is substantially as follows: She smelled of intoxicating liquor; she was abusive towards the officers and had to be forcibly placed in the police car; she had to be assisted at the police station; she staggered when she walked; and her tongue was thick, her hair and clothing were disarranged, her eyes were glassy, and her language was vulgar. Several witnesses testified to these facts and expressed opinions based thereon that she was intoxicated. The evidence, although disputed by her, was ample to sustain the verdict of the jury under our holdings in Poppe v. State, *ante* p. 527, 52 N. W. 2d 422, and Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462.

The defendant complains of the failure of the trial court to give seven instructions requested by her. The

record discloses that the first five were given in substantially the language requested. The trial court may properly instruct in his own language and refuse tendered instructions, though correct, which are covered by the instructions given by the court. Instructions Nos. 6 and 7, requested by the defendant, purport to define the word "intoxicated" and the term "under the influence of alcoholic liquor" as they bear upon the issues of this case. The trial court gave an instruction upon this question and, if it is correct, no error can be predicated upon the court's refusal to give defendant's requested instructions Nos. 6 and 7.

Instruction No. 6, given by the court, is as follows: "The meaning of the term 'under the influence of alcoholic liquor' as applied to a person operating a motor vehicle is, if the alcoholic liquor has so far affected the nerves, brain and muscles of the operator of a motor vehicle so as to impair to any appreciable degree his ability to operate his motor vehicle in the manner that an ordinary prudent and cautious man, in full possession of his faculties would operate the same, then the operator of said motor vehicle is under the influence of alcoholic liquor."

The foregoing instruction appears to have been approved in People v. Dingle, 56 Cal. App. 445, 205 P. 705. It was followed in People v. Ekstromer, 71 Cal. App. 239, 235 P. 69.

Defendant relies upon Freeburg v. State, 92 Neb. 346, 138 N. W. 143, Ann. Cas. 1913E 1101, wherein an instruction employed the test of visible effect to determine if one was under the influence of intoxicating liquor. The instruction given in the present case does not limit its meaning to the test of visibility. The condition and actions of the defendant are included with that of the visible effect in determining whether defendant was driving a motor vehicle while "under the influence of alcoholic liquor." This removes the criticism contained in the Freeburg case. We find no error prejudicial to

the rights of the defendant in the giving of the trial court's instruction No. 6. We have examined the other instructions complained of and find them to be free from error.

The Attorney General argues that the errors claimed in the giving of instructions on the court's own motion and in the refusal of those tendered by the defendant are not properly before the court for the reasons stated in Gates v. City of North Platte, 126 Neb. 785, 254 N. W. 418, wherein it is said: "The instructions given were grouped in one assignment, and those refused were grouped in another assignment in the motion for new trial; hence, the instructions will not be reviewed, as all of them given were not erroneous, and at least one of the defendant city's requests was rightfully refused." In the case before us the assignments of error set forth in the petition in error, filed in this court, complied with the rule announced in Klause v. Nebraska State Board of Agriculture, 150 Neb. 466, 35 N. W. 2d 104. The exceptions taken to a group of instructions in a petition in error need be no more specific than required in a motion for a new trial. Consequently, the objections to the instructions were properly raised under the rule announced in the Klause case.

The defendant complains of the manner and form adopted in proving the first and second convictions of the defendant for operating a motor vehicle while under the influence of alcoholic liquor. The procedure followed was in conformity with that approved in Haffke v. State, *supra*. We reiterate that proof of such convictions is properly made by offering in evidence the complaint or information, the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that defendant is the same person presently before the court.

Defendant contends that the evidence is insufficient because it does not show that the sentences imposed in the prior convictions were served or paid. Such proof

is not relevant. The word "conviction" as used in section 39-727, R. S. Supp., 1949, means the adjudication by the court of defendant's guilt and the pronouncement by the court of the penalty imposed on the acceptance of a plea of guilty or a finding of guilt by the court. The actual service of imprisonment or the payment of a fine has nothing to do with the question of determining whether a conviction has or has not been had. State v. Smith, 160 Fla. 288, 34 S. 2d 533; State v. Volmer, 6 Kan. 379.

Prejudicial error is not pointed out or found in the record before us. The judgment is affirmed.

AFFIRMED.

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ROBERT SCHREINER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
54 N. W. 2d 224

Filed June 20, 1952. No. 33178.

1. **Rape.** In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
2. **Trial: Appeal and Error.** The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial.
3. **New Trial: Appeal and Error.** Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown.
4. **Trial.** The charge or instruction required by law to be reduced to writing is only that which the court may have to say to the jury in regard to the principles of law applicable to the case and to the evidence; and hence an oral statement or communica-

tion by the court to the jury, which is rather in the nature of a cautionary direction, and not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, need not be in writing.

ERROR to the district court for Sheridan County: EARL L. MEYER, JUDGE. *Affirmed.*

*Frank F. Aplan* and *Charles A. Fisher,* for plaintiff in error.

*Clarence S. Beck,* Attorney General, and *Robert A. Nelson,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

The plaintiff in error was charged by information with assault with intent to commit rape on a 14-year-old girl. He was tried, found guilty, and sentenced. He brings the cause here by petition in error. He will be hereinafter referred to as the defendant.

We consider the argued assignments in the order in which they arose at the trial.

Defendant contends that the corroborating evidence was insufficient to sustain the verdict.

The applicable rule is: "In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." Hughes v. State, 154 Neb. 86, 46 N. W. 2d 904.

The evidence of the state is summarized. The prosecuting witness will be referred to herein as the girl, she was 14 years of age. The defendant was 24 or 25 years of age. On July 14, 1951, at 7:30 p. m., the girl met the

defendant on the streets of Rushville. She got into the seat of a truck which he was driving and with him went to the home of some of her friends in that city. They remained there some 15 or 20 minutes. The defendant and the girl in the truck then went east a short distance, left the main road, and turned into a side road which ran roughly parallel to the main road with a distance of 250 or 300 feet between them. There defendant stopped the truck. Defendant put his arm around the girl and pinched her. The girl was dressed on the evening in question in slacks, a blouse, shoes, and a head scarf. Defendant tried to unbutton her slacks. He started to grab her breasts. A fight ensued first in the truck, and the girl jumped out of the truck. Defendant grabbed her, they fought in a ditch along the highway, defendant threw the girl to the ground, held her there, slapped her, she kicked him, and got up and ran across to the adjoining highway, defendant chasing her. During the events in and near the truck, she lost one of her shoes. This evidence as to the occurrences in and near the truck are testified to by the girl. She reached the highway where she was found by a man and woman passing by as she came up on the shoulder of the road. These witnesses testified that she was crying and excited; her hair was disheveled; and she was without one shoe. She told them what had happened. On the same evening and within a few minutes she told her mother what had happened. Defendant was arrested later that evening. The shoe and scarf of the girl were found in his truck. Defendant was advised of the crime with which he was charged. The next day, defendant told the sheriff, "It don't hurt, a guy can try."

We hold that the evidence was ample to sustain the verdict of guilty.

Defendant tendered two requested instructions. The trial court refused to give them. Defendant did not assign this as error in the motion for a new trial.

The rule is: "The correctness of the ruling of a dis-

trict court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial." Lackey v. State, 56 Neb. 298, 76 N. W. 561. See, also, Barker v. State, 73 Neb. 469, 103 N. W. 71; Lukehart v. State, 91 Neb. 219, 136 N. W. 40.

During the deliberation of the jury and about 11 a. m., the bailiff furnished a dictionary to the jury, at its request. In a few minutes the court found out about it and required its redelivery. Defendant's counsel was absent, having been excused by the court. At 1:45 p. m., the court in the presence of the defendant and his counsel examined the jury on the matter. The foreman advised the court that they had looked up the definition of a word; that "we didn't get too much out of it"; and all the jurors advised the court that their deliberations had not in anywise been affected by the reference to the dictionary. The court did not stop there, but undertook to explain to the jury why their use of the dictionary was improper. He then told the jury "your verdict must be based alone upon the evidence and the instructions which I gave you; you can use your own general understanding, but not something which you may have gotten from a dictionary or some other source" and that "I want to be sure that you are influenced solely by the instructions given and the evidence here, and not something else."

It seems that before being called to the court room the jury had sent an inquiry to the court as to whether the verdict had to be signed by all of the jurors. The court orally answered: "* * * the foreman alone may sign it, but it must be agreed to and be the verdict of each member." At the conclusion of these matters, counsel for the State and defendant were given leave to examine the jury and had no questions to ask.

The defendant assigns as error the conduct of the jury with reference to the dictionary and error in the giving of oral instructions. Defendant largely relies on

the case of Harris v. State, 24 Neb. 803, 40 N. W. 317. There the jury got possession of a dictionary and the statutes, and used the dictionary to ascertain the meaning of a word. A reading of the decision shows that it turned not upon the use of the dictionary, but upon the use of the statutes to the extent recited in the opinion. In Matters v. State, 120 Neb. 404, 232 N. W. 781, a juror during deliberations produced a dictionary and read from it the definition of some words which were contained in an instruction. We held: "This conduct was highly improper. The jury should have relied solely upon the evidence for the facts, and upon the court's instructions for the law, of the case. Not every violation of the proprieties, however, is sufficient to reverse a judgment. It is only such misconduct of the jury as is calculated to prejudice the substantial rights of the defendant that is ground for a new trial. In Simmons v. State, 111 Neb. 644, this court held: 'Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown.' This ruling was approved and adhered to in Murray v. State, 119 Neb. 16. The record does not disclose that any substantial right of defendant was affected by the alleged misconduct of the jury; * * *."

We reach the same conclusion in the instant case.

The trial court did orally instruct the jury that they were to follow the instructions already given and the evidence. He did orally instruct as to how to sign the verdict. Defendant assigns this as error in violation of provisions of the statutes that require all instructions to be in writing and forbid that they be "orally qualified, modified or in any manner explained to the jury by the court." § 29-2016, R. R. S. 1943.

In Grammer v. State, 103 Neb. 325, 172 N. W. 41, 174 N. W. 507, we considered a number of oral instructions given to a jury. We there adopted the following rule:

" 'The charge or instruction required by law to be reduced to writing is only that which the court may have to say to the jury in regard to the principles of law applicable to the case and to the evidence; and hence an oral statement or communication by the court to the jury, which is rather in the nature of a cautionary direction, and not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, need not be in writing.' "

The instructions here given fall into the classification of those not required to be in writing.

The defendant on his motion for new trial offered an affidavit of a juror that the verdict of guilty had been arrived at by the jury prior to the time the jury was called into court and prior to the oral discussion above summarized. It becomes apparent then by his own showing that he was not prejudiced by what was said by the court.

The judgment of the district court is affirmed.

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**Agency.**

1. The authority of a person to act for and bind another is a question of fact. There is no presumption of its existence. *Wagoun v. Chicago, B. & Q. R. R.* ..... 132
2. An agent who represents himself as a principal and induces another to deal with him as such is liable and may be treated as principal for all purposes until the fact of his agency is made known. A person dealing with the agent of an undisclosed principal may, after disclosure, sue either the principal or agent, or both. *Garbark v. Newman* ..... 188

**Animals.**

No right of action for damages accrues to an individual injured by a violation of the act regulating Bang's disease. *Strauel v. Peterson* ..... 448

**Appeal and Error.**

1. The ruling on a motion for a new trial for misconduct of the jury will not be disturbed on appeal where there is evidence to support it and the finding thereon is not clearly wrong. *Pope v. Tapelt* ..... 10

2. On appeal from the ruling on a motion for judgment notwithstanding the verdict, the Supreme Court is required to examine the legal sufficiency of the entire evidence. *In re Estate of Bingaman* ..... 24
3. On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings. *Webber v. City of Scottsbluff* .... 48
4. Jurisdictional defects may be noticed at any stage of the proceedings. If the court proceeds without jurisdiction the whole proceedings are void. *Webber v. City of Scottsbluff* ..... 48
5. If the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant to present those reasons and in appropriate manner support his contentions. The appellee has then the duty, if he desires, of meeting those contentions, and has the right to submit additional reasons to sustain the trial court's judgment. *Sautter v. Poss* 62
6. Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done. *Spreitzer v. State* ..... 70
7. It is not the province of the Supreme Court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury. *Spreitzer v. State* ..... 70
8. In a criminal action, the Supreme Court will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt.
*Spreitzer v. State* ..... 70
*Schmidt v. State* ..... 369
*Poppe v. State* ..... 527
9. Actions in equity, on appeal to the Supreme Court, are triable de novo, subject to the rule with respect to the superior opportunity of the trial court to observe the witnesses. *Wiskocil v. Kliment* ..... 103
*Chambers v. Chambers* ..... 160
*Rossbach v. Bilby* ..... 575
10. An appeal from an order of the district court granting a motion for a judgment notwithstanding the verdict requires the Supreme Court to consider the entire record and to determine whether it does or

does not justify the action of the trial court. *Wagoun v. Chicago, B. & Q. R. R.* ..... 132
11. To obtain a review of errors of law occurring upon the trial of an equity case, a motion for new trial must be filed assigning the same therein. *Faught v. Platte Valley Public Power & Irrigation Dist.* .... 141
12. Alleged errors must be assigned and discussed in the brief filed in Supreme Court on appeal or they will not ordinarily be considered. *Faught v. Platte Valley Public Power & Irrigation Dist.* ..... 141
13. In a law action, the denial over objection of a jury trial, while error, is not in all cases prejudicial. *Garbark v. Newman* ..... 188
14. The findings of a court in a law action have the effect of a verdict of a jury and will not be disturbed unless clearly wrong. *Garbark v. Newman* .... 188
15. In determining an appeal in equity involving questions of fact, the Supreme Court is required to reach an independent conclusion without regard to the findings of the district court. In determining the weight of the credible evidence, where there is an irreconcilable conflict on a material issue, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. *Johnston v. Johnston* 222
16. A workmen's compensation case is a civil action equitable in character and so triable by the Supreme Court on appeal. *Peek v. Ayres Auto Supply* ..... 233
17. The filing of a motion for new trial is not necessary in order to obtain review of a workmen's compensation case upon the merits in the Supreme Court. *Peek v. Ayres Auto Supply* ..... 233
18. In order to review errors of law which allegedly occurred during the trial of a workmen's compensation case, a motion for a new trial must be timely filed assigning such errors therein. The errors must also be subsequently assigned and discussed in the brief filed in the Supreme Court on appeal, or they will not ordinarily be considered. *Peek v. Ayres Auto Supply* ..... 233
19. A motion for new trial is not a necessary prerequisite in a workmen's compensation case in order for the Supreme Court to search the record, try the case de novo thereon, and render such judgment as should have been rendered. *Peek v. Ayres Auto Supply* ..... 233

20. Findings of court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong. In a non-jury law action, the findings of the court have the effect of a verdict of a jury and will not be disturbed unless clearly wrong. *Cotner College v. Estate of Hester* ..... 279
21. The Supreme Court will not disturb the findings of a jury unless on an examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong. *Stolting v. Everett* ..... 292
22. Exhibits must be brought before the reviewing court by being incorporated in the bill of exceptions if action of the district court based thereon is to be reviewed. *Dolen v. Dolen* ..... 347
23. Where certain exhibits introduced with reference to the defense of res judicata are not incorporated in the bill of exceptions, the reviewing court will not pass upon the sufficiency of the evidence to determine the validity of such a defense. *Dolen v. Dolen* 347
24. On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *Safeway Cabs, Inc. v. Honer* ..... 418
25. When a case is sent back by the Supreme Court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein. *Stocker v. Wells* ..... 472
26. An appeal in a workmen's compensation case will be considered by the Supreme Court de novo upon the record. *Rahfeldt v. Swanson* ..... 482
*Myszkowski v. Wilson and Company, Inc.* ..... 714
27. In a workmen's compensation case if the evidence is in irreconcilable conflict the Supreme Court may upon a trial de novo consider the fact that the district court gave credence to testimony of some witnesses rather than contradictory testimony of other witnesses. *Rahfeldt v. Swanson* ..... 482
28. Affidavits in support of a motion for new trial which are not embodied in a bill of exceptions will not be considered on appeal. *Nebraska Methodist Hospital v. McCloud* ..... 500

29. In a law action where a jury is waived, a finding of fact by the court will not be disturbed on appeal unless clearly wrong. *Grand Island Finance Co. v. Eacker* ..... 546
*Flaherty v. Carskadon* ..... 853
30. The Supreme Court will not in an appeal consider or determine the constitutionality of a statute unless it has been made an issue in the case in the trial court. *Johnson v. Richards* ..... 552
31. Consideration of a case in Supreme Court will be limited to errors assigned and discussed, and an assignment of error not discussed will be considered waived. *Johnson v. Richards* ..... 552
32. Where an employer appeals to the Supreme Court from an award of the district court in a workmen's compensation case and fails to obtain any reduction in the amount of such award, the Supreme Court should allow the employee a reasonable sum for attorney's fee for the proceedings in the Supreme Court. *Anderson v. Bituminous Casualty Co.* ..... 590
33. The overruling of a motion to dismiss an appeal from the county court to the district court in a probate proceeding wherein upon the face of the record it appears that the district court upon appeal has jurisdiction of the subject matter for hearing upon the merits is not a final order from which an appeal can be taken to the Supreme Court. *Egan v. Bunner* 611
34. Upon appeal the same cause must be presented in the Supreme Court that was tried in the court below. If an issue is there tried by both parties, without objection from either that the issue is not sufficiently pleaded, such objection will not be considered in the Supreme Court as ground for reversal. *Franzen v. Blakley* ..... 621
35. An issue not presented in the trial court may not be raised for the first time in the Supreme Court. *Freeman v. City of Neligh* ..... 651
36. Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions. *Freeman v. City of Neligh* ..... 651
37. A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the trial court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed. *Freeman v. City of Neligh* ..... 651

38. Where an assignment of error in the Supreme Court fails to specify to which one or more of the various points made by a motion for new trial the assignment was intended to apply, it is too indefinite to present a question for review. *Perry v. Gross* ..... 662

39. Where the issues in an action for criminal conversation are presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong. *Klingingsmith v. Allen* ..... 674

40. The meaning of an instruction, not the phraseology, is the important consideration. A claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear. *Scarborough v. Aeroservice, Inc.* ..... 749

41. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined by a consideration of all that is said on the subject. *Scarborough v. Aeroservice, Inc.* ..... 749

42. Appeals in probate matters from the county court to the district court, except from the probate or denial of probate of wills and from the allowance or disallowance of claims filed against an estate, are tried in district court as cases in equity are conducted. *Cass v. Pense* ..... 792

43. Appeals to the Supreme Court in probate matters, subject to certain exceptions, are heard and determined de novo. *Cass v. Pense* ..... 792

44. If, on appeal, it is determined that the trial court erroneously sustained either a demurrer to the evidence or a motion to dismiss, both parties are entitled to be placed in the same position they were in before the error occurred. *Peterson v. Massey* ..... 829

45. In order that assignments of error as to the admission or rejection of evidence may be considered, the rules of court require that appropriate reference be made to specific evidence against which objection is urged. *Flaherty v. Carskadon* ..... 853

46. An action in equity is considered de novo in Supreme Court. *Bussell v. McClellan* ..... 875

47. An exception to a group of instructions collectively in a motion for a new trial are deemed for the purpose of review in Supreme Court as a separate ex-

ception to each instruction included within the group. *Danielson v. State* ..... 890
48. The exceptions taken to a group of instructions in a petition in error need be no more specific than required in a motion for a new trial. *Danielson v. State* ..... 890
49. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered in Supreme Court unless such ruling is first challenged by motion for a new trial. *Schreiner v. State* 894
50. Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown. *Schreiner v. State* ..... 894

**Assignments.**
1. Where an executory contract is rescinded by agreement of the parties an assignee of one of the parties of benefits which had not accrued at the time of rescission may not maintain action therefor against the other party in the absence of assumption of liability therefor by such other party. *Babson v. Village of Ulysses* ..... 492
2. An assignment of a contract or a right flowing therefrom does not create a contractual obligation between the assignee and the other party to the contract in the absence of assumption of the liabilities of the assignor by the assignee. *Babson v. Village of Ulysses* ..... 492
3. An assignee of the obligation of a contract takes subject to its burdens in the hands of the assignor and in order to recover he must show that the conditions have been performed. He is bound by the terms of the contract to the same extent as the assignor. *Babson v. Village of Ulysses* ..... 492
4. An assignee of a non-negotiable chose in action ordinarily acquires no greater right than that possessed by his assignor. He stands in the shoes of the assignor and he cannot sue if the assignor could not have maintained the action. *Babson v. Village of Ulysses* ..... 492

**Attorney and Client.**
1. An attorney may testify to factual matters relating to the execution of a will but anything in the na-

ture of a communication is privileged and inadmissible unless waived. *Nelson v. Glidewell* ..... 372
2. The right to tax attorney's fees in compensation cases is purely statutory. No other authority to allow an attorney's fee is authorized. *Franzen v. Blakley* ..... 621
3. Except as provided by law or by a uniform course of procedure, recovery of attorney's fees is not allowable in this jurisdiction. *Fulk v. School District* 630
4. The Supreme Court has the sole power to punish for contempt a person assuming to practice law within the state without having been licensed to do so. *Cornett v. State* ..... 766

**Automobiles.**

1. The duty of a guest riding in an automobile is to use ordinary care. Ordinarily, the guest need not watch the road or advise the driver in the management of the car. *Sautter v. Poss* ..... 62
2. When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable. *Sautter v. Poss* ..... 62
3. The Certificate of Title Act was enacted for the protection of owners of motor vehicles, those holding liens thereon, and the public. *Bank of Keystone v. Kayton* ..... 79
4. The Certificate of Title Act eliminates the practice of filing and recording chattel mortgages on motor vehicles in the chattel mortgage records, and substitutes the recording of such upon the certificate of title itself. *Bank of Keystone v. Kayton* ..... 79
5. One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificate of title to motor vehicles. *Bank of Keystone v. Kayton* ..... 79
6. Under the act relating to certificates of title to motor vehicles, no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the county clerk of the county in which the applicant resides. *Bank of Keystone v. Kayton* ..... 79
7. A certificate of title of a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle. *Garbark v. Newman* ..... 188

8. Under the Uniform Sales Act, if a buyer of an automobile for legal cause rescinds the purchase and the seller refuses the offer of return of the vehicle, the buyer becomes a bailee for hire of the property, subject to a lien to secure repayment of the price paid, and is entitled to reasonable compensation from the seller for its care and protection. The buyer may in such a situation place the property in storage, and if he does, the seller is liable for and may be required to pay the reasonable storage charges as a prerequisite of his securing possession of the property. *Garbark v. Newman* .... 188
9. Installation and use of warning devices on motor-propelled vehicles is required to apprise pedestrians and other drivers of the approach of an on-coming car. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case. *Adams v. Welliver* ..... 331
10. It is the duty of the driver of an automobile to exercise reasonable care in its operation. When pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated. *Adams v. Welliver* ..... 331
11. Until the driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise. *Adams v. Welliver* ..... 331
12. A pedestrian is required to exercise a greater degree of care between intersections than at a crosswalk where protection is afforded by giving the pedestrian the right-of-way. *Wilson v. Wiggins* .... 382
13. One who crosses a street between intersections is required to keep a constant lookout in all directions from which danger should reasonably be anticipated. *Wilson v. Wiggins* ..... 382
14. One who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law. *Wilson v. Wiggins* ..... 382
15. Unless some reasonable excuse is shown, one who is obligated to keep a lookout is required to see that which is in plain sight. Where he fails to do so, his negligence is sufficient to defeat a recovery. *Wilson v. Wiggins* ..... 382

16. Rules applicable stated under statute providing that every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk, or intersection shall yield the right-of-way to vehicles upon the highway. *Wilson v. Wiggins* ..... 382
17. Gross negligence within the meaning of the automobile guest statute means negligence in a very high degree, or the absence of even slight care in the performance of a duty. *Pavlicek v. Cacak* .... 454
18. In an action under the automobile guest statute a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence. *Pavlicek v. Cacak* ..... 454
19. Imposition of increased penalty for subsequent violations of motor vehicle statute is constitutional. *Poppe v. State* ..... 527
20. Evidence as to the identification of the defendant as the same person charged and convicted of two previous offenses under motor vehicle statute was sufficient to identify the defendant as the same person. *Poppe v. State* ..... 527
21. The presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to exercise a degree of care commensurate with surrounding circumstances. *Murray v. Pearson Appliance Store* ..... 860
22. Rule with respect to duty of driver of motor vehicle to keep a proper lookout stated. *Murray v. Pearson Appliance Store* ..... 860
23. As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. *Murray v. Pearson Appliance Store* ..... 860

**Bailments.**

Generally a bailee is charged with the amount and kind of care of the subject of the bailment that

would be exercised by an ordinarily prudent person in the same or similar circumstances. *Garbark v. Newman* ..... 188

**Bills and Notes.**

1. In an action between the original parties to a promissory note, general principles of estoppel apply in determining whether or not defendant is estopped to defend upon the ground that there was a failure of consideration. *Cotner College v. Estate of Hester* 279
2. As between the parties, the consideration for a subscription note is tested by the situation existing at the time it is sought to enforce the subscription. *Cotner College v. Estate of Hester* ..... 279
3. It is implied that the money shall not be diverted from the purpose of a subscription note and that the enterprise shall not be abandoned. *Cotner College v. Estate of Hester* ..... 279

**Cancellation of Instruments.**

Where it is sought to set aside a written instrument on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a higher quality of evidence than in a case where there are no such presumptions to overcome. *Johnston v. Johnston* ..... 222

**Carriers.**

A private carrier is one that is not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a special contract. Such carrier is liable only for such loss or injury as results from a failure to exercise ordinary care. *Scarborough v. Aeroservice, Inc.* ..... 749

**Charities.**

In the absence of any stipulations upon the subject in the subscription, the abandonment of a charitable or public enterprise releases the subscriber to its fund. *Cotner College v. Estate of Hester* ..... 279

**Chattel Mortgages.**

The Certificate of Title Act eliminates the practice of filing and recording chattel mortgages on motor ve-

hicles in the chattel mortgage records, and substitutes the recording of such upon the certificate of title itself. *Bank of Keystone v. Kayton* ..... 79

**Children Born out of Wedlock.**

The amount which a defendant in a paternity proceeding will be required to pay for the support of his child is in the discretion of the district court. The award will not be disturbed unless discretion has been abused and it is manifestly excessive. *Race v. Mrsny* ..... 679

**Clerks of Courts.**

Money paid to the clerk of the court pursuant to an order or judgment of the court is received by the clerk in his official capacity. *Webber v. City of Scottsbluff* ..... 48

**Colleges and Universities.**

1. In the absence of any stipulations upon the subject in the subscription, the abandonment of a charitable or public enterprise releases the subscriber to its fund. *Cotner College v. Estate of Hester* ..... 279
2. It is implied that the money shall not be diverted from the purpose of a subscription note and that the enterprise shall not be abandoned. *Cotner College v. Estate of Hester* ..... 279

**Constitutional Law.**

1. When an increase or decrease in compensation occurs during an officer's term because of a change in population after his election, such increase or decrease in compensation does not violate the constitutional provision that the compensation of a public officer shall not be increased or diminished during his term. *Hamilton v. Foster* ..... 89
2. The practice of osteopathy is recognized by law as a lawful occupation in the public interest. It may not be arbitrarily limited or discriminated against, and its advocates may lawfully operate property and facilities for the treatment, according to its tenets, of patients seeking its aid, subject only to reasonable regulations under the police power relating to the public health and welfare. *Morgan v. State* ..... 247
3. A regulation adopted by the Department of Health that all persons admitted to a licensed hospital must

be under the care of a person licensed to practice medicine and surgery in Nebraska has no relation to health or public welfare, is unreasonable, discriminatory and capricious, is an unlawful exercise of the police power, and is invalid. *Morgan v. State* 247

4. Imposition of increased penalty for subsequent violations of motor vehicle statute is constitutional. *Poppe v. State* ..... 527

5. Constitutional guarantees are of little avail unless carried out in the spirit in which they were framed. No plea of public benefits should be permitted to impoverish the owner of private property or override a plain constitutional inhibition. *Quest v. East Omaha Drainage Dist.* ..... 538

6. One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking, but also is liable for consequential damage to other property in excess of the damage sustained by the public at large. *Quest v. East Omaha Drainage Dist.* ..... 538

7. In the provision of the Constitution of Nebraska authorizing recovery for damage to property for public use, the words, "or damaged," include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Quest v. East Omaha Drainage Dist.* ..... 538

8. In a suit to recover damages under the constitutional provision for damage to property for public use, it is immaterial whether the petition states a cause of action ex delicto or ex contractu. If the fact is established that property has been damaged for public use, the owner is entitled to compensation. *Quest v. East Omaha Drainage Dist.* ..... 538

9. In a case based on the constitutional provision with respect to taking or damaging of property for public use, proof of negligence or the commission of a wrongful act is not necessary to a recovery. *Quest v. East Omaha Drainage Dist.* ..... 538

10. In an action for damages against a drainage district for the damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice as to how and when the damage had occurred. *Quest v. East Omaha Drainage Dist.* ..... 538

11. The Supreme Court will not in an appeal consider or determine the constitutionality of a statute un-

less it has been made an issue in the case in the trial court. *Johnson v. Richards* ..... 552

12. Statute with respect to improvement of streets is not unconstitutional for failure of lawful classification of property owners or violation of due process. *Freeman v. City of Neligh* ..... 651
13. Conviction of contempt was not violative of the due process provisions of the state and federal Constitutions. *Cornett v. State* ..... 766
14. Blanket Mill Tax Levy Act is not unconstitutional for defect of title. *Peterson v. Hancock* ..... 801
15. Sections 4 and 5 of the Blanket Mill Tax Levy Act are unconstitutional because of lack of uniformity. *Peterson v. Hancock* ..... 801
16. Invalid portions of Blanket Mill Tax Levy Act are so connected with remainder that entire act is unconstitutional. *Peterson v. Hancock* ..... 801

**Contempt.**

1. The Supreme Court has the sole power to punish for contempt a person assuming to practice law within the state without having been licensed to do so. *Cornett v. State* ..... 766
2. In determining the sufficiency of an information, the test is whether or not enough remains after rejecting all unnecessary averments thereof to satisfy the requirements of a sufficient information. *Cornett v. State* ..... 766
3. If the conduct charged is contemptuous of the district court and of the Supreme Court at the same time, the wrongdoer may be proceeded against in the district court for so much of the conduct that constitutes a constructive contempt of that court. *Cornett v. State* ..... 766
4. If the facts pleaded in an information in contempt clearly show that the act complained of was willful, the information is not fatally defective for failure to use the word "willful." *Cornett v. State* ..... 766
5. The issuance of an order to show cause as a means of obtaining jurisdiction of the person of the defendant does not have the effect of shifting the burden of proof from the state to the defendant. *Cornett v. State* ..... 766
6. A proceeding for a constructive contempt must be instituted in the court toward which the contempt is directed. *Cornett v. State* ..... 766

7. When the facts pleaded in an information charging a constructive criminal contempt show that the contempt was directed toward the court in which the proceeding was filed, the information is sufficient to confer jurisdiction upon that court. *Cornett v. State* ..... 766
8. Where a person, for the purpose of securing money for himself, falsely pretends to another who is interested in pending litigation that he can corruptly influence the course of the suit by approaching officers of the court with money, his conduct is contemptuous of the court toward which it is directed. *Cornett v. State* ..... 766
9. Where the purpose of an act is to create in the mind of another a belief that courts or their officers are dishonest and that justice can be bought, it constitutes a hindrance to the due administration of justice which the court toward which it is directed may punish. *Cornett v. State* ..... 766

**Continuances.**

1. Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions. *Freeman v. City of Neligh* ..... 651
2. A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the trial court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed. *Freeman v. City of Neligh* ..... 651

**Contracts.**

1. The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties. *In re Estate of Bingaman* ..... 24
2. Existing statutes and laws with reference to which a contract is made enter into and become part thereof, subject to appropriate legislative limitations subsequently enacted under the police power of the state, and such principle embraces alike those which affect its validity, construction, discharge, and enforcement. *Faught v. Platte Valley Public Power & Irrigation Dist.* ..... 141
3. When a statute prescribes a duty and a contract is made involving performance of that duty, such statute becomes a part of the contract. Where the

law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts providing for the public service. *Faught v. Platte Valley Public Power & Irrigation Dist.* .... 141

4. Where from the nature of a contract it is evident that the parties contracted on the basis of the continued existence of a condition or state of things to which it relates, the cessation of existence of the condition will excuse performance, a condition to such effect being implied in spite of the fact that the promise may have been unqualified. *Faught v. Platte Valley Public Power & Irrigation Dist.* ..... 141

5. A construction conferring a right in perpetuity will be avoided unless compelled by unequivocal language of the contract. A contract will not be construed as imposing a perpetual obligation when to do so would be adverse to public interests. *Faught v. Platte Valley Public Power & Irrigation Dist.* ..... 141

6. Where a contract requires successive steps to be taken by the respective parties, if, when a step becomes due, one party either in words or by their equivalent in acts declines to take it or is unable to do so while the other is ready and willing to do his part, the latter may rescind the contract. *Faught v. Platte Valley Public Power & Irrigation Dist.* .... 141

7. If a material change in the plan or purpose for which a subscription is made is effected without the consent of the subscriber, he is excused from performing his promise unless estopped to deny his consent to the change. *Cotner College v. Estate of Hester* ..... 279

8. Where there is a total failure of consideration and defendant has derived no benefit beyond the amount of money which he has already advanced, such failure of consideration may be shown in bar of the action. *Cotner College v. Estate of Hester* ..... 279

9. The doctrine of substantial performance has no application where the party obligated to perform deliberately and intentionally departs from the terms of the contract and attempts to substitute another type of performance. *Cotner College v. Estate of Hester* ..... 279

10. It does not follow that, because a technical rescission has not been and cannot be made, a defendant cannot avail himself of the defense of want or failure of consideration. *Cotner College v. Estate of Hester* ..... 279

11. Duty to make compensation is discharged in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited by a judicial order made with due authority by a judge who has jurisdiction of the subject matter and the parties. *Kuhl v. School District* ..... 357
12. Courts will not resort to construction where the terms of a contract are clear and plain, and the interests of the parties are clearly expressed. *Platte Valley P. P. & I. Dist. v. Cover* ..... 479

**Corporations.**

A corporation is a complete entity, separate and distinguishable from its stockholders and officers. *Safeway Cabs, Inc. v. Honer* ..... 418

**Costs.**

1. A person who has been brought in as a party to an action between others is ordinarily entitled to recover his costs if no cause of action against him is established and he is not shown to have any interest in the subject matter of the litigation. *Stocker v. Wells* ..... 472
2. Unless it appears that depositions were not taken in good faith or were actually unnecessary, costs of taking them are properly taxable although they were not used at the trial. *Stocker v. Wells* ..... 472
3. The discretion conferred upon the trial court in taxing costs is not arbitrary but a legal one to be exercised within the limitations of legal and equitable principles. *Stocker v. Wells* ..... 472
4. Representatives of estates are personally liable for costs incurred on an appeal resulting from their fault or misconduct. *Breuer v. Cassidy* ..... 836

**Counties.**

1. Under the County Budget Act, the prohibition against creating indebtedness does not relate to the condition of the budget at the time a claim is filed or acted on by the board but to the time the contract is entered into or liability incurred for any of the purposes for which provision is made in the budget. *Becker v. County of Platte* ..... 180
2. When a private citizen is impressed into service by the sheriff, a contract of employment with the county

results. The county so employing a citizen becomes liable to him for the reasonable value of the services he renders at the direction of the sheriff. *Anderson v. Bituminous Casualty Co.* ..... 590

**Courts.**

1. The exercise of judicial functions is required when it comes to the stage of compensating the owner of the property in eminent domain proceedings. *Webber v. City of Scottsbluff* ..... 48
2. The owner of the property to be condemned is entitled to notice of the proceedings and an opportunity to protect his rights. *Webber v. City of Scottsbluff* ..... 48
3. Jurisdictional defects may be noticed at any stage of the proceedings. If the court proceeds without jurisdiction the whole proceedings are void. *Webber v. City of Scottsbluff* ..... 48
4. A party invoking the court's jurisdiction in a case where the court has jurisdiction of the subject matter is estopped to object thereto afterward. *Webber v. City of Scottsbluff* ..... 48
5. Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done. *Spreitzer v. State* ..... 70
6. The character of an action is not changed by an improper transfer thereof from a law to an equity docket. *Garbark v. Newman* ..... 188
7. A litigant cannot trifle with the processes of the court by asserting under oath at different times the truth of each of two or more contradictory versions of an event or events in controversy according to the necessities of the particular occasion presenting itself. *Rahfeldt v. Swanson* ..... 482
8. The rule of practice and procedure in criminal cases promulgated under the authority of the Constitution providing for determination by court if increased penalty for subsequent offenses is adhered to. *Poppe v. State* ..... 527
9. The county court has no jurisdiction over a claim against the estate of a decedent, which is not properly filed for allowance until after it has been finally barred by the statute of nonclaims. *Breuer v. Cassidy* ..... 836

**Covenants.**

The language of an instrument frequently requires construction to determine whether it creates a condition subsequent, a covenant, or both. When found to create both, the person entitled to enforce the covenant is entitled to all equitable relief normally available with respect to such a covenant, despite the fact that a condition subsequent also exists. *Dahlke v. Dahlke* ..... 169

**Criminal Law.**

1. In a criminal action, the Supreme Court will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. *Spreitzer v. State* ..... 70
   *Schmidt v. State* ..... 369
   *Poppe v. State* ..... 527
2. It is proper to charge, and error to refuse to charge, that a reasonable doubt may arise either from the evidence or from a want of evidence, and that the absence of sufficiently satisfying evidence may be a ground for a reasonable doubt of defendant's guilt. *Spreitzer v. State* ..... 70
3. Where an information is filed under the Probation Act charging a violation of an order of probation, the endorsing of the names of witnesses on an information is not mandatory and the failure to do so is not error. *Young v. State* ..... 261
4. It is entirely proper for the court, where probation violation is established, to inquire into the matters covered by the Probation Act in determining whether or not the probation order should be vacated and the penalty of the law imposed. *Young v. State* ..... 261
5. It is not error, in the absence of a showing that defendant was prejudiced thereby, to sentence a defendant after verdict and before a motion for a new trial has been filed. *Young v. State* ..... 261
6. In a criminal case, the court is not required to defer judgment until the statutory time for filing a motion for a new trial has expired. *Young v. State* ..... 261
7. In determining whether or not to set aside a probationary order and to impose the penalty which it might have imposed before placing the defendant on probation, the trial court is not limited to a consider-

ation of probative evidence of matters arising subsequent to the order of probation. *Young v. State* .... 261

8. Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion. *Young v. State* ..... 261

9. The rule of practice and procedure in criminal cases promulgated under the authority of the Constitution providing for determination by court if increased penalty for subsequent offenses is adhered to. *Poppe v. State* ..... 527

10. When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute. *Poppe v. State* ..... 527

11. Evidence as to the identification of the defendant as the same person charged and convicted of two previous offenses under motor vehicle statute was sufficient to identify the defendant as the same person. *Poppe v. State* ..... 527

12. Where a person accused of crime is found within the territorial jurisdiction where he is so charged, the right to put him on trial for the offense charged is not impaired by the fact that he was brought from another jurisdiction by illegal means such as unlawful force or fraud. *Howell v. Hann* ..... 698

13. Compliance with a sentence lawfully imposed is not essential to the proof of a prior conviction under statute imposing heavier penalty on conviction of subsequent offense. *Danielson v. State* ..... 890

14. Proof of prior conviction under motor vehicle statute imposing heavier penalty for subsequent convictions is properly made by offering in evidence the complaint or information, the judgment rendered on the verdict or plea of guilty, proof that the judgment has become final, and evidence that defendant is the same person presently before the court. *Danielson v. State* ..... 890

**Damages.**

1. The recovery of proximate special damages is recognized in this state. *Garbark v. Newman* ..... 188

2. In an action for damages by floodwaters of a stream allegedly caused by the negligent construction of

jetties and a dike, the burden of proof is on the plaintiffs to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages caused thereby. *Stolting v. Everett* ..... 292

3. Where there are elements of damage, such as expenditures, capable of pecuniary measurement, the law requires the amount shall be proved. *Murray v. Pearson Appliance Store* ..... 860

**Death.**

1. A child born dead cannot maintain an action at common law for injuries received by it before its birth. *Drabbels v. Skelly Oil Co.* ..... 17
2. Since no cause of action accrues to a child born dead for prenatal injuries, none survives to the personal representative under the wrongful death statute. *Drabbels v. Skelly Oil Co.* ..... 17

**Deeds.**

1. Where the language of a deed conveying a remainder interest to a class does not provide for a defeasance in case of the death of one of the class during the continuance of the life estate the vested interest of such member of the class does not lapse but descends to his heirs. *Semrad v. Semrad* ..... 209
2. A deed is not to be held a mortgage unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage. *Dingwerth v. Assendrop* ..... 343

**Descent and Distribution.**

Real estate not disposed of by will becomes intestate property and descends to the heirs at law of the testator. *Jacobsen v. Farnham* ..... 776

**Divorce.**

1. If the circumstances of the parties shall change or it shall be to the best interests of the children, the court may on its own motion or on the petition of either parent revise or alter, to any extent, a divorce

decree as it concerns the care, custody, and maintenance of the children. *Stanley v. Stanley* ..... 125
2. A party may not in an action for divorce challenge the right of a plaintiff to maintain an action after having filed cross-petition therein for divorce and having obtained the relief prayed for. *Chambers v. Chambers* ..... 160
3. Rule for determination of alimony and division of property in divorce case is stated. *Chambers v. Chambers* ..... 160
*Parker v. Parker* ..... 325
*Dolen v. Dolen* ..... 347
4. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties. *Parker v. Parker* ..... 325
5. The exact amount or degree of corroboration required in a divorce case cannot be stated, and each case must be determined upon its facts and circumstances. *Parker v. Parker* ..... 325
6. Extreme cruelty may consist of physical violence, it may be conduct of such a character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom it is inflicted, or it may be such conduct as to destroy the objects of matrimony. *Parker v. Parker* ..... 325
7. A litigant may not have the benefit of condonation unless it is properly pleaded. *Zutavern v. Zutavern* 395
8. In an action by the husband to annul a marriage, the wife is entitled to alimony pendente lite and counsel fees, and the fact that the husband proceeds by cross-petition instead of an original suit does not affect the rule. *Zutavern v. Zutavern* .... 395
9. Alimony, payable in monthly installments, is generally considered as terminating on the death of either of the parties, where no statute to the contrary exists and the judgment or decree is silent on the subject. *Masters v. Masters* ..... 569
10. A judgment for alimony requiring monthly payments until further order of the court terminates on the death of the husband, where there are no directions or circumstances indicating an intent to provide for payments after his death. *Masters v. Masters* ..... 569

**Easements.**

1. Title by prescription to an easement can be obtained substantially in the same manner as title to

real estate by adverse possession. *Jurgensen v. Ainscow* ..... 701
2. To establish an easement by prescription, there must be a use having all of the elements of adverse possession, and the use must continue for the full prescriptive period. *Jurgensen v. Ainscow* ..... 701
3. To prove a prescriptive right to an easement all of the elements to a prescriptive use must be generally established by clear, convincing, and satisfactory evidence. *Jurgensen v. Ainscow* ..... 701
4. Where a claimant has shown adverse use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of showing the use to be permissive. *Jurgensen v. Ainscow* ..... 701
5. Acquiscence on the part of the owner which is necessary to acquisition of a prescriptive easement means passive assent or submission. *Jurgensen v. Ainscow* ..... 701
6. If the use of an easement has been open, adverse, notorious, peaceable, and uninterrupted, the owner of the servient tenement is charged with knowledge of such use, and acquiscence in it is implied. *Jurgensen v. Ainscow* ..... 701
7. The extent and nature of an easement is determined from the use actually made of the property during the running of the prescriptive period. *Jurgensen v. Ainscow* ..... 701
8. The term "exclusive use" does not mean that no one has used the easement except the claimant. It simply means that his right to do so does not depend upon a similar right in others. *Jurgensen v. Ainscow* ..... 701
9. "Actual possession" means the corporeal detention of the property when used in relation to adverse possession. *Jurgensen v. Ainscow* ..... 701

**Elections.**

1. Any election at which there is a general popular expression of the public will, whether that election be a state, county, or city election, is a general election. *Allen v. Tobin* ..... 212
2. The constitutional and statutory definitions of a general state election are not conclusive to the ex-

tent of including a general municipal election. *Allen v. Tobin* ..... 212

3. A petition signed by the electors of any city or village of such number as shall equal twenty percent of the votes cast at the last general municipal election held therein is sufficient to comply with provision of Liquor Control Act requiring calling of election. *Allen v. Tobin* ..... 212
4. When a petition meets the requirements of the Liquor Control Act to submit to the electorate of any city or village the proposition of sale of alcoholic liquors by the drink, except beer, such petition vests jurisdiction in the proper city officials to call an election for such purpose. *Allen v. Tobin* ..... 212
5. Under the provisions of the Liquor Control Act liquor may be sold by the drink in any city or village where the people thereof authorize it. *Allen v. Tobin* ..... 212
6. To authorize issuance of bonds for the purpose of building a new school building and securing the necessary furniture and apparatus for the same, the vote of 55 percent of all qualified electors of the school district voting on the proposition in favor thereof is required. *Greathouse v. School District* 883
7. It is the policy of the law to prevent the disfranchisement of qualified electors who have cast their ballots in good faith by requiring only a substantial compliance with the election laws of the state. *Greathouse v. School District* ..... 883
8. On the trial of a contested election ballots will not be treated as void simply because of irregular or unauthorized markings or mutilations which appear to have been innocently made as the result of awkwardness, inattention, mistake, or ignorance, if the lawful intent of the voter can be ascertained therefrom. *Greathouse v. School District* ..... 883
9. Under School Bond Issue Act, requiring a proposal for the issuance of school bonds to be adopted by 55 percent of the ballots cast at the election by qualified electors of the school district on the question, ballots improperly cast or rejected for illegality cannot be counted in determining the vote cast. *Greathouse v. School District* ..... 883
10. In the absence of statutory provision to the contrary, ballots which have been cast in a school district election which are entitled by law to be counted in declaring the result of the election shall

alone be counted in determining the vote cast. *Greathouse v. School District* ..... 883

**Eminent Domain.**

1. Statutes prescribing proceedings for the condemnation of property must be strictly construed against the condemnor and in favor of the landowner. *Webber v. City of Scottsbluff* ..... 48
2. Eminent domain statute should not be so strictly construed as to defeat the purpose sought to be accomplished. *Webber v. City of Scottsbluff* ..... 48
3. The exercise of judicial functions is required when it comes to the stage of compensating the owner of the property in eminent domain proceedings. *Webber v. City of Scottsbluff* ..... 48
4. The owner of the property to be condemned is entitled to notice of the proceedings and an opportunity to protect his rights. *Webber v. City of Scottsbluff* ..... 48
5. On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings. *Webber v. City of Scottsbluff* 48
6. In an appeal to the district court from the award of appraisers in a proceeding for condemnation of land for the use of a municipal corporation, if the verdict of the jury exceeds the award of the appraisers the verdict bears interest from the date of the appropriation. *Miller v. City of Scottsbluff* .... 185
7. When lands are taken through exercise of the power of eminent domain, the owners thereof are entitled to recover as full compensation for the lands actually taken and for damages to the remainder thereof such an amount as is equivalent to the diminution of the fair market value thereof resulting therefrom. *Medelman v. Stanton-Pilger Drainage Dist.* ..... 518
8. The market value of property includes its value for any reasonable use to which it may be adaptable. *Medelman v. Stanton-Pilger Drainage Dist.* ..... 518
9. The purchase of property by a public corporation, where it could have been acquired by the power of eminent domain, carries with it all the incidents of taking or damaging by eminent domain insofar as the question of damages by reason of the taking or damaging is concerned. *Quest v. East Omaha Drainage Dist.* ..... 538

10. One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking, but also is liable for consequential damage to other property in excess of the damage sustained by the public at large. *Quest v. East Omaha Drainage Dist.* ..... 538
11. In the provision of the Constitution of Nebraska authorizing recovery for damage to property for public use, the words, "or damaged," include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Quest v. East Omaha Drainage Dist.* ..... 538
12. In a suit to recover damages under the constitutional provision for damage to property for public use, it is immaterial whether the petition states a cause of action ex delicto or ex contractu. If the fact is established that property has been damaged for public use, the owner is entitled to compensation. *Quest v. East Omaha Drainage Dist.* ..... 538
13. Where land is not taken, the measure of damages is the difference in market value before and after the damaging, taking into consideration the uses to which the land was put and for which it was reasonably suitable. *Quest v. East Omaha Drainage Dist.* ..... 538
14. Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled. *Quest v. East Omaha Drainage Dist.* ..... 538
15. In fixing the damages sustained by a landowner in consequence of the appropriation or injury of his property for a public use, the jury may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property. *Quest v. East Omaha Drainage Dist.* ..... 538
16. In a case based on the constitutional provision with respect to taking or damaging of property for public use, proof of negligence or the commission of a wrongful act is not necessary to a recovery. *Quest v. East Omaha Drainage Dist.* ..... 538
17. In an action for damages against a drainage district for the damaging of private property for a public use, it is not necessary for plaintiff to plead

or prove that he filed a notice as to how and when the damage had occurred. *Quest v. East Omaha Drainage Dist.* ..... 538

**Equity.**

1. Where property is transferred to another subject to the payment of a certain sum to a third person, an equitable charge and not a trust is created. Where property is transferred to another with direction to pay to a third person a certain sum out of the property or its proceeds, a trust and not an equitable charge is created. *Dahlke v. Dahlke* ..... 169
2. In the case of an equitable charge, the person having title to property holds it subject to an equitable interest in another person, and the equitable encumbrancer has an equitable lien thereon. The person who holds subject to the charge is the owner of the property, subject only to the lien. *Dahlke v. Dahlke* 169
3. An original action in equity is an appropriate and permissible remedy to exclude or detach land unlawfully included in the area of an irrigation district. *Smith v. Frenchman-Cambridge Irrigation Dist.* ..... 270
4. If a party is not guilty of inequitable conduct toward the other person concerned in that transaction, the equitable doctrine of clean hands does not apply. *Zutavern v. Zutavern* ..... 395
5. In an equity suit where a motion to dismiss at the conclusion of plaintiff's evidence was improperly sustained, the cause should be remanded for a new trial. *Rosebud Lumber and Coal Company v. Holms* 459
6. Where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. *Brehan v. The Crete Mills* .... 505
7. Laches is not available to defeat an action in equity where there has been no material change in the defendant's position or in the subject matter of the action caused by plaintiff's delay; nor where the plaintiff has been ignorant of his rights, or, though apprehensive of them, there was such an obscurity in the transaction that it was difficult to gain the facts upon which to maintain the action. *Fulk v. School District* ..... 630
8. In dealing with legal rights, equity adopts and follows the rules of law. Whenever there is an ex-

plicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law. *In re Petition of Ritchie* ..... 824

9. The maxim "Equity follows the law" means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common or statute law. *In re Petition of Ritchie* ..... 824

10. The maxim "Equity follows the law" is applicable whenever the rights of the parties are clearly defined and established by law, especially when defined and established by constitutional or statutory provisions. *In re Petition of Ritchie* ..... 824

11. An equity court will not by its decree set aside legislative enactments or render for naught their mandates. *In re Petition of Ritchie* ..... 824

12. Adoption proceedings do not depend upon equitable principles. Where the essential statutory requirements have not been met, equity cannot decree an adoption. *In re Petition of Ritchie* ..... 824

**Estates.**

1. Where two unequal estates vest in the same person at the same time, without an intervening estate, the smaller is thereupon merged in the greater. *Central Construction Co. v. Highsmith* ..... 113

2. Merger does not always or necessarily result from a coinciding of estates. *Central Construction Co. v. Highsmith* ..... 113

3. Whether two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected. *Central Construction Co. v. Highsmith* ..... 113

4. An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that upon the occurrence of a stated event, the conveyor or his successor in interest shall have the power to terminate the estate so created. *Dahlke v. Dahlke* ..... 169

5. When a transferor having an estate in fee simple absolute transfers it subject to a condition subsequent, the transferee is regarded as having received the entire estate of the transferor, who, by virtue

of his reserved power of termination has the power to regain his former estate if and when there is a breach of the condition subsequent. *Dahlke v. Dahlke* ..... 169

6. The owner of an estate in fee simple defeasible may be restricted in his uses of the affected land by an outstanding easement or profit or restricting covenant; or his estate may be subject to a money charge in favor of a third person which operates as a lien thereon. *Dahlke v. Dahlke* ..... 169

7. The language of an instrument frequently requires construction to determine whether it creates a condition subsequent, a covenant, or both. When found to create both, the person entitled to enforce the covenant is entitled to all equitable relief normally available with respect to such covenant, despite the fact that a condition subsequent also exists. *Dahlke v. Dahlke* ..... 169

8. Where the grantor conveys real estate to a life tenant with remainder to the children of the life tenant, all children of the life tenant whether in being or born thereafter during the continuance of the life estate are included as remaindermen. *Semrad v. Semrad* ..... 209

9. Where the language of a deed conveying a remainder interest to a class does not provide for a defeasance in case of the death of one of the class during the continuance of the life estate, the vested interest of such member of the class does not lapse but descends to his heirs. *Semrad v. Semrad* .... 209

**Estoppel.**

1. A party invoking the court's jurisdiction in a case where the court has jurisdiction of the subject matter is estopped to object thereto afterward. *Webber v. City of Scottsbluff* ..... 48

2. A person who has given a reason for his conduct and decision concerning a matter involved in controversy cannot, after litigation has begun, change his position and place or explain his conduct upon a different consideration. *Garbark v. Newman* ..... 188

3. Equitable estoppel arises from conduct of a party whereby he is absolutely precluded from asserting rights which might have otherwise existed as against another person who in good faith relied upon such conduct and has been led thereby to change his

position for the worse. *Cotner College v. Estate of Hester* ..... 279

4. In an action between the original parties to a promissory note, general principles of estoppel apply in determining whether or not defendant is estopped to defend upon the ground that there was a failure of consideration. *Cotner College v. Estate of Hester* ..... 279

**Evidence.**

1. While a court will take judicial notice of its records, it will not ordinarily in one case take such notice of the record in another case. *Anderson v. Anderson* ..... 1
2. The doctrine that the court will take judicial notice of a final order made by it in another case which is interwoven and interdependent with the pending case is an exception to the general rule, recognized by the necessity of giving effect to a former holding. *Anderson v. Anderson* ..... 1
3. A litigant may withdraw his motion for a mistrial because of the admission of prejudicial evidence at any time prior to the court's ruling thereon. *Pope v. Tapelt* ..... 10
4. A litigant who adduces evidence allegedly prejudicial from a witness on cross-examination, and makes no timely objection thereto, thereby waives any claim of error in its admission. *Pope v. Tapelt* .... 10
5. Circumstantial evidence is insufficient to sustain a verdict or to require submission of a case to a jury unless the circumstances proved by the evidence are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom. *In re Estate of Bingaman* ..... 24
6. Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony. *Stolting v. Everett* ..... 292
   *Medelman v. Stanton-Pilger Drainage Dist.* ..... 518
7. When two or more persons employ the same attorney in relation to the same business their communications are not privileged between themselves where the disclosures are made in the presence of all parties concerned or are intended for the information of all parties. *Nelson v. Glidewell* ..... 372
8. Either lay or expert witnesses may testify as to the value of a tract of land taken or the value of the

remainder thereof immediately before and immediately after the taking if proper foundation is laid, the weight and credibility of their testimony being for the jury. *Medelman v. Stanton-Pilger Drainage Dist.* ..... 518

9. Parol evidence of a prior or contemporaneous oral agreement is not admissible to vary, alter, or contradict the terms of a written agreement. *Perry v. Gross* ..... 662

10. The parol evidence rule is one of substantive law as well as of evidence. As a rule of substantive law, it renders ineffective proof of prior or contemporaneous oral agreement tending to vary, alter, or contradict the terms of a written agreement. *Perry v. Gross* ..... 662

11. As an exception to the parol evidence rule, a distinct oral agreement constituting a condition on which performance of a written contract or agreement is to depend may be proven. *Perry v. Gross* 662

12. Statements made by plaintiff's wife to plaintiff out of the presence of defendant are inadmissible in an action for criminal conversation to prove the alleged wrongful conduct of the defendant. *Klinginsmith v. Allen* ..... 674

13. In an action for criminal conversation, statements made by plaintiff's wife out of the presence of defendant are only admissible where alienation of affections is pleaded by plaintiff as an issue or element of damages and then only when relevant and offered for the limited purpose of showing the wife's state of mind or feelings toward plaintiff. *Klinginsmith v. Allen* ..... 674

14. The exclusion of evidence fully established by other competent and uncontradicted evidence is not reversible error. *Klinginsmith v. Allen* ..... 674

15. The admission of cumulative evidence is ordinarily within the discretion of the trial court and its ruling thereon will not be held erroneous unless it clearly appears that such discretion has been abused. *Klinginsmith v. Allen* ..... 674

16. The necessity of giving effect to a former holding which finally decided questions of law and fact justifies the court in taking judicial notice of a final order made by it in another case which is interwoven and interdependent with the pending case. *Glissmann v. Grabow* ..... 690

17. The admissions of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence. *Scarborough v. Aeroservice, Inc.* ..... 749
18. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will where a claimed ambiguity is patent and not latent. *Jacobsen v. Farnham* ..... 776

**Executors and Administrators.**
1. An action based on negligence for personal injuries may be prosecuted against the estate of a decedent. *In re Estate of Bingaman* ..... 24
2. The authority of an executor is principally but not solely derived from the will in which he is nominated. Until the court has approved his nomination, and he has qualified and has been granted letters testamentary, his authority is not complete. *Johnson v. Richards* ..... 552
3. The personal representative and his attorney are both fiduciaries in their relation to the estate of the deceased and the persons interested therein. *Johnson v. Richards* ..... 552
4. Upon the death of a husband the homestead vests immediately in his widow and should not be taken into account in the administration of his estate. *Horn v. Gates* ..... 667
5. If, at the time of the husband's decease, there was a homestead the widow cannot abandon that homestead and select another out of the estate in lieu thereof. *Horn v. Gates* ..... 667
6. In the settlement of an estate an administrator is the agent and trustee of the decedent. He possesses only such powers as are granted to him by statute, and he must discharge the trust subject to all limitations imposed upon him. *Breuer v. Cassidy* ..... 836
7. Compensation for services rendered during the lifetime of a decedent must be based on an agreement, express or implied, to pay therefor, which is established by a preponderance of the evidence. *Breuer v. Cassidy* ..... 836
8. Every person having a claim or demand against the estate of a deceased person must exhibit it to the county judge within the time fixed or it is forever barred. *Breuer v. Cassidy* ..... 836
9. A volunteer, who pays claims of a decedent incurred in his lifetime without taking an assignment and

making proof thereof, does not have an allowable claim. The fact that the volunteer subsequently becomes administrator of the estate does not change the requirement. *Breuer v. Cassidy* ..... 836

10. One who intermeddles in an estate and without authority pays alleged claims with his own funds without taking assignments thereof or making proof occupies the same position as a volunteer acting before the death of the decedent. *Breuer v. Cassidy* 836

11. The county court has no jurisdiction over a claim against the estate of a decedent, which is not properly filed for allowance until after it has been finally barred by the statute of nonclaims. *Breuer v. Cassidy* ..... 836

12. An administrator who pays out funds of the estate in payment of attorney fees and other expenses incurred in administering the estate, without approval and final allowance by the county court, does so subject to such approval and final allowance. *Breuer v. Cassidy* ..... 836

**Fraud.**

1. A person may not be held responsible for misrepresentations not made, authorized, or participated in by him. *Wagoun v. Chicago, B. & Q. R. R.* ..... 132

2. Misrepresentation of a material fact made by a person representing a releasor and relied and acted upon by him does not constitute a basis for avoidance of the release of a claim for personal injuries unless the misrepresentation was also made on the authority or with the knowledge of the releasee. *Wagoun v. Chicago, B. & Q. R. R.* ..... 132

3. A positive statement of a seller of the condition of personal property indicating his intention to be bound for the truth thereof, and which was so understood and relied upon by the other party, is an express warranty. *Garbark v. Newman* ..... 188

4. Where rescission of a sale of goods is based on a false representation of quality, condition, or matter affecting its value, the purchaser must show that the representation was material and that he was misled thereby to his damage. *Garbark v. Newman* ..... 188

5. If a misrepresentation is likely to affect the conduct of a reasonable person with reference to a transaction, it is generally material to the contract and it will be assumed, in the absence of contrary

showing, that a person deceived thereby was induced to act by the misrepresentation. *Garbark v. Newman* 188

6. A person is justified in relying upon a representation made to him if it is a positive statement of fact and if an investigation would be required to discover the truth. *Garbark v. Newman* ..... 188

7. Where it is sought to set aside a written instrument on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a higher quality of evidence than in a case where there are no such presumptions to overcome. *Johnston v. Johnston* ..... 222

8. In an action based on fraud, the existence of a confidential or fiduciary relationship does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may have the effect of placing the burden of going forward with the evidence upon the party charged with fraud. *Johnston v. Johnston* ..... 222

9. Marriage is a civil contract which, if procured by fraud, may, under certain conditions, be set aside. *Zutavern v. Zutavern* ..... 395

10. Fraud sufficient to vitiate a marriage must go to the essence of the marriage relation. *Zutavern v. Zutavern* ..... 395

11. The fraud that vitiates a marriage contract does not lend itself to definitive statement automatically resolving every case. *Zutavern v. Zutavern* ..... 395

12. In absence of ratification, a man induced to marry a woman upon false representations that he is father of a child with which she is pregnant may have marriage annulled for fraud. *Zutavern v. Zutavern* ..... 395

13. If one under no duty to speak does so, he must tell the truth and not suppress or materially qualify facts within his knowledge affecting the subject of his disclosure. Fraudulent representations may consist of half-truths. A representation literally true is fraudulent if used to create an impression substantially false. A slight imposition may terminate the privilege of silence. *Johnson v. Richards* ..... 552

14. Extrinsic fraud is that practiced in the act of obtaining an adjudication in the course of litigation.

It consists of something done by the successful party that prevents the unsuccessful party from presenting his case or defense so that there was not a real contest in or actual litigation of the issue of the case. *Johnson v. Richards* ..... 552

15. The equity powers are ample, independently of statute, to set aside a probate procured by fraud. *Johnson v. Richards* ..... 552

16. In an original suit to annul a judgment on the ground that it was fraudulently obtained, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision of the issues was not attributable to his own carelessness or inaction. *Glissmann v. Grabow* ..... 690

**Frauds, Statute of.**

1. The statute of frauds does not apply to a constructive trust. *Wiskocil v. Kliment* ..... 103

2. Oral agreements for the sale of lands are void on their face as within the statute of frauds because not in writing unless there has been part performance by the promisee which is solely referable to the contract sought to be established and not such as might be referable to any other contract or situation. *Dingwerth v. Assendrop* ..... 343

3. Burden and elements of proof stated where party seeks specific performance of an oral contract for the conveyance of land of a deceased person. *Nelson v. Glidewell* ..... 372

**Guardian and Ward.**

1. A proceeding for the appointment of a guardian is in this state a probate matter. *Cass v. Pense* .... 792

2. The authority to appoint a guardian for an adult person depends upon statute and unless the requisites thereof are shown to exist the court is without power to make an appointment. *Cass v. Pense* .... 792

3. The examination at the trial of an application for the appointment of a guardian for an adult person should be directed to such inquiries as have for their object the finding and determination of the mental condition of the person alleged to be mentally ill or mentally incompetent. *Cass v. Pense* ..... 792

4. In the statute prescribing the requisites for the appointment of a guardian for an adult person, mentally ill is one cause, and mentally incompetent by

reason of old age or other cause to have charge and management of property is another. *Cass v. Pense* 792

5. The statute providing for the appointment of a conservator is for the benefit of any adult who is not a spendthrift, mentally ill, or mentally incompetent, but who considers himself unfit by reason of infirmities of age or physical disability to manage his estate. *Cass v. Pense* ..... 792

**Habeas Corpus.**

1. In general, the writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice. *Lung v. Frandsen* ..... 255
2. A petition for a writ of habeas corpus must state the facts which it is contended constitute the illegal restraint. *Stapleman v. Hann* ..... 410
3. A petition which states as a conclusion that a petitioner is illegally restrained of his liberty is not sufficient as a basis for the issuance of a writ of habeas corpus. *Stapleman v. Hann* ..... 410
4. It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it and if it fails to state a cause of action to enter an order denying a writ. *Stapleman v. Hann* .... 410
*Howell v. Hann* ..... 698

**Health.**

1. Osteopathy may, in general terms, be defined as the treatment of human ills by means of manipulative therapy as distinguished from the treatment of such ills through the use of drugs and operative surgery by physicians and surgeons. *Morgan v. State* .... 247
2. The practice of osteopathy is recognized by law as a lawful occupation in the public interest. It may not be arbitrarily limited or discriminated against, and its advocates may lawfully operate property and facilities for the treatment, according to its tenets, of patients seeking its aid, subject only to reasonable regulations under the police power relating to the public health and welfare. *Morgan v. State* ..... 247
3. A licensed osteopath in this state is authorized to practice osteopathy in all of its branches as taught in osteopathic colleges recognized by the American Osteopathic Association; to perform surgery as it

is taught and used as a part of the osteopathic system, but not including operative surgery with surgical instruments; and to practice obstetrics and use anesthetics. *Morgan v. State* ..... 247

**Highways.**

1. To establish a highway by prescription there must be a user by the general public under a claim of right, adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of ten years. *State ex rel. Weinberger v. Gormley* ..... 242
2. The establishment of highways, the building of bridges, or the making of local improvements is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course. *State ex rel. Weinberger v. Gormley* ..... 242

**Homesteads.**

1. Whether one has acquired a homestead, or having acquired it has abandoned it, is a question of fact. *Horn v. Gates* ..... 667
2. The burden rests upon one asserting an abandonment of a homestead to establish such abandonment by a preponderance of the evidence. *Horn v. Gates* 667
3. An intention to abandon and an actual abandonment must concur to establish the abandonment of a homestead interest. *Horn v. Gates* ..... 667
4. Where the owner of a homestead removes therefrom with his family to another home of which he is the owner, it will be presumed that he has abandoned the first home and thereby the homestead right in it. But this, like other presumptions, may be rebutted by evidence to the contrary. *Horn v. Gates* ..... 667
5. A person cannot at the same time have two homesteads, nor can he have two places either of which, at his election, he may claim as his homestead. *Horn v. Gates* ..... 667
6. The term "homestead" means the house and land where the family dwells. *Horn v. Gates* ..... 667
7. Upon the death of a husband the homestead vests immediately in his widow and should not be taken into account in the administration of his estate. *Horn v. Gates* ..... 667

8. If, at the time of the husband's decease, there was a homestead, the widow cannot abandon that homestead and select another out of the estate in lieu thereof. *Horn v. Gates* ..... 667

**Hospitals.**

A regulation adopted by the Department of Health that all persons admitted to a licensed hospital must be under the care of a person licensed to practice medicine and surgery in Nebraska has no relation to health or public welfare, is unreasonable, discriminatory and capricious, is an unlawful exercise of the police power, and is invalid. *Morgan v. State* ..... 247

**Husband and Wife.**

1. A postnuptial or separation agreement is valid (1) if it is fair and equitable, (2) if there has been conduct of a party justifying legal separation, (3) if the parties immediately separate, and (4) if the provisions of the agreement are observed by the parties. *Chambers v. Chambers* ..... 160
2. Postnuptial agreements are without validity during the existence of the complete marriage relation. *Chambers v. Chambers* ..... 160
3. A postnuptial or separation agreement validly entered into at the time is invalidated by a resumption of the complete marriage relation. *Chambers v. Chambers* ..... 160
4. Where the legitimacy of a child born in wedlock is in issue, the testimony of the husband and wife is incompetent on the question of access. Neither the husband nor wife should be permitted to testify to collateral facts from which an inference of access or nonaccess might be drawn. *Zutavern v. Zutavern* 395
5. Where the issues in an action for criminal conversation are presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong. *Klinginsmith v. Allen* ..... 674
6. Statements made by plaintiff's wife to plaintiff out of the presence of defendant are inadmissible in an action for criminal conversation to prove the alleged wrongful conduct of the defendant. *Klinginsmith v. Allen* ..... 674
7. In an action for criminal conversation, statements made by plaintiff's wife out of the presence of de-

fendant are only admissible where alienation of affections is pleaded by plaintiff as an issue or element of damages and then only when relevant and offered for the limited purpose of showing the wife's state of mind or feelings toward plaintiff. *Klinginsmith v. Allen* ..... 674

8. No resulting trust necessarily arises in favor of a person furnishing the consideration for the purchase of property taken in the name of another, where the parties were sufficiently close so as to give rise to the presumption that a gift was intended. Where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift. *Peterson v. Massey* ..... 829

9. An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual services rendered him outside of her domestic duties is valid, and, when established by a preponderance of the evidence, is enforceable as against him or his estate. *Peterson v. Massey* .... 829

10. Though a wife renders services outside of the ordinary household duties, generally there is no implied obligation on the husband's part to pay her for them. *Peterson v. Massey* ..... 829

**Indictments and Informations.**

1. An information meets fundamental purposes of information, as well as constitutional requirements, when it fairly enables defendant to prepare a defense and plead the judgment in bar in a subsequent prosecution. *Spreitzer v. State* ..... 70

2. Where an information is filed under the Probation Act charging a violation of an order of probation, the endorsing of the names of witnesses on an information is not mandatory and the failure to do so is not error. *Young v. State* ..... 261

**Infants.**

1. Until the driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise. *Adams v. Welliver* ..... 331

2. The age when an infant may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be

fixed by arbitrary rule, and is generally a question of fact for the jury. *Adams v. Welliver* ..... 331

3. Whether or not an infant between nine and ten years of age may be subject to the defense of contributory negligence is generally a question of fact and not of law. *Adams v. Welliver* ..... 331
4. What is required of an infant is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. *Adams v. Welliver* ..... 331
5. The county court has power to appoint a guardian ad litem to represent an infant who is interested in a matter then pending in that court. *Cass v. Pense* ..... 792

**Injunctions.**

1. When an injunction is legally granted in a case where the court has jurisdiction of the subject matter and the parties, it must be respected and obeyed until it is set aside by the court allowing it, or it is reversed in the appellate court by some appropriate mode of direct review. *Kuhl v. School District* ..... 357
2. A litigant cannot successfully invoke injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate. *Stahl v. Allchin* ..... 412
3. Several independent tort-feasors may be joined in an action in equity for an injunction when the petition states but one cause of action against the joint tort-feasors. *Brchan v. The Crete Mills* ..... 505
4. An action for an injunction to restrain or abate a continuing nuisance may be maintained by any person who suffers damage or injury thereby. An injured party may recover such damages in the injunction action as he may have sustained by such wrongful act. *Brchan v. The Crete Mills* ..... 505
5. When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction. Where the law requires that the question shall be submitted to popular vote, an issue of bonds without such a vote will be enjoined. *Nacke v. City of Hebron* ..... 739

6. One seeking to restrain an act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation. *Martin v. City of Lincoln* ..... 845
7. A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay. *Martin v. City of Lincoln* ..... 845
8. A resident taxpayer without showing any interest or injury peculiar to himself may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. *Martin v. City of Lincoln* 845
9. In an action by a taxpayer to enjoin municipal authorities from making illegal purchases the seller is not a necessary party. *Martin v. City of Lincoln* 845
10. Injunction is the appropriate remedy for the protection of plaintiffs' rights herein. *Bussell v. McClellan* ..... 875

**Insane Persons.**

1. Mentally incompetent means that the mind is so affected as to have lost control of itself to such a degree as to deprive the person affected of sane and normal action. *Cass v. Pense* ..... 792
2. Mental incompetency exists when there is definite privation of reasoning faculties to the extent that the person affected is incapable of understanding and acting with reasonable discretion in the ordinary affairs of life. *Cass v. Pense* ..... 792

**Intoxicating Liquors.**

1. The Liquor Control Act is to be liberally construed. *Allen v. Tobin* ..... 212
2. A petition signed by the electors of any city or village of such number as shall equal twenty percent of the votes cast at the last general municipal election held therein is sufficient to comply with provision of Liquor Control Act requiring calling of election. *Allen v. Tobin* ..... 212
3. When a petition meets the requirements of the Liquor Control Act to submit to the electorate of any city or village the proposition of sale of alcoholic

liquors by the drink, except beer, such petition vests jurisdiction in the proper city officials to call an election for such purpose. *Allen v. Tobin* ..... 212
4. Under the provisions of the Liquor Control Act liquor may be sold by the drink in any city or village where the people thereof authorize it. *Allen v. Tobin* ..... 212

**Joint Adventures.**
1. To constitute joint adventure, there must be a community of interest and common purpose in performance. Each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one may entrust performance to the other. *Rossbach v. Bilby* 575
*Peterson v. Massey* ..... 829
2. More convincing evidence is required to prove existence of a joint adventure where alleged joint adventurers are the only litigants than where the controversy is between a third party and the joint adventurers. *Rossbach v. Bilby* ..... 575
3. Evidence was insufficient to establish a joint adventure. *Rossbach v. Bilby* ..... 575
4. A joint adventure is in the nature of a partnership, but may exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit. *Peterson v. Massey* ..... 829
5. The burden of establishing the existence of either a joint enterprise or a partnership is upon the party asserting that the relationship exists. *Peterson v. Massey* ..... 829

**Judgments.**
1. All matters in issue in a former action and judicially determined are conclusively put at rest by a judgment therein and may not again be litigated in a subsequent action. *Anderson v. Anderson* ..... 1
*Glissmann v. Grabow* ..... 690
2. Except in special cases, the plea of res judicata applies, not only to points upon which the court was required by the parties to pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties might have brought forward therein. *Anderson v. Anderson* ..... 1

3. A litigant may not present an issue for determination and avoid the effect of an adjudication or estoppel by withholding proof thereof. *Anderson v. Anderson* ..... 1
4. A judgment on the merits constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose. *Webber v. City of Scottsbluff* ..... 60
5. A judgment is not res judicata as to any fact at issue in subsequent actions where neither issues nor parties are the same. *Kuhl v. School District* ..... 357
6. An action under the Uniform Declaratory Judgments Act should be dismissed without prejudice whenever all parties whose rights would be adjudicated by the action have not been impleaded. *Stahl v. Allchin* ..... 412
7. The equity powers are ample, independently of statute, to set aside a probate procured by fraud. *Johnson v. Richards* ..... 552
8. The requisite conditions precedent of obtaining relief by a declaratory judgment proceeding are stated. *Schroder v. City of Lincoln* ..... 599
9. If the evidence given on a former trial is not contained in the record under review, the court cannot determine whether the judgment rendered on such trial was the result of false testimony. *Glissmann v. Grabow* ..... 690
10. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited by statute. *Gasper v. Mazur* ..... 856

**Juries.**

1. Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial. *Pope v. Tapelt* ..... 10
2. Matters of supposition or opinion on the part of jurors while deliberating inhere in the jury's verdict and are not competent to be shown in an attempted impeachment of a verdict. *Pope v. Tapelt* ..... 10

3. It is not the province of the Supreme Court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury. *Spreitzer v. State* ..... 70
4. No affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict. *Spreitzer v. State* ..... 70
5. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. *Spreitzer v. State* ..... 70
6. In a law action, the denial over objection of a jury trial, while error, is not in all cases prejudicial. *Garbark v. Newman* ..... 188
7. The length of time devoted to meals cannot be shown for the purpose of proving that the jury did not deliberate for the prescribed length of time provided by law. *Cartwright and Wilson Constr. Co. v. Smith* ..... 431
8. If the voir dire examination of a juror considered as a whole does not show incompetency, a challenge upon that ground is properly overruled, although during his examination statements are made which, if unexplained, might be ground for challenge. *May v. State* ..... 786

Larceny.

In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence. *Spreitzer v. State* ..... 70

Liens.

1. One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles. *Bank of Keystone v. Kayton* ..... 79
2. Under the act relating to certificates of title to motor vehicles, no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the county clerk

of the county in which the applicant resides. *Bank of Keystone v. Kayton* ..... 79

**Mandamus.**

1. A court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency. *State ex rel. Bintz v. State Board of Examiners* ..... 99
2. A finding of fact in a mandamus proceeding will not be disturbed on appeal unless it is clearly wrong. *State ex rel. Weinberger v. Gormley* ..... 242
3. The establishment of highways, the building of bridges, or the making of local improvements is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course. *State ex rel. Weinberger v. Gormley* ..... 242

**Marriage.**

1. Marriage is a civil contract which, if procured by fraud, may, under certain conditions, be set aside. *Zutavern v. Zutavern* ..... 395
2. Fraud sufficient to vitiate a marriage must go to the essence of the marriage relation. *Zutavern v. Zutavern* ..... 395
3. The fraud that vitiates a marriage contract does not lend itself to definitive statement automatically resolving every case. *Zutavern v. Zutavern* ..... 395
4. In absence of ratification, a man induced to marry a woman upon false representations that he is father of a child with which she is pregnant may have marriage annulled for fraud. *Zutavern v. Zutavern* 395

**Master and Servant.**

1. The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties. *In re Estate of Bingaman* ..... 24
2. A person in the relationship of a fellow employee to another is not liable for negligent acts committed under the direction and control of the employer except for misfeasance or positive wrong. *In re Estate of Bingaman* ..... 24
3. The fact than an employee is the general servant of one employer does not, as a matter of law, prevent

him from becoming the particular servant of another, who may become liable for his acts. *Kessler v. Bates & Rogers Construction Co.* ..... 40

4. The right of control determines if the relation of master and servant exists between the employee and his general employer, or whether he has become a special employee of another person. *Kessler v. Bates & Rogers Construction Co.* ..... 40

**Mechanics' Liens.**

1. Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged. *Central Construction Co. v. Highsmith* ..... 113

2. Since the object of the mechanic's lien law is to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction. *Central Construction Co. v. Highsmith* ..... 113
*Rosebud Lumber and Coal Company v. Holms* ..... 459

3. Where a claimant, either by gross carelessness or by design, puts upon record an erroneous statement, the law will not aid him in enforcing his lien. If the errors are trifling and immaterial, the recovery of a just debt will not be denied where nothing but fair dealing was intended. *Central Construction Co. v. Highsmith* ..... 113

4. Mechanic's lien statutes should receive a liberal construction so as to effectuate their objects and purposes. *Rosebud Lumber and Coal Company v. Holms* ..... 459

5. A subcontractor can acquire a lien under the mechanic's lien law for such materials only as were delivered at the building for use therein or were actually used in the construction thereof. *Rosebud Lumber and Coal Company v. Holms* ..... 459

6. A mechanic's lien is given not upon the ground that a contract was made by the owner with such subcontractor, but because the material furnished was used in the erection of the building. *Rosebud Lumber and Coal Company v. Holms* ..... 459

7. The sworn statement of a subcontractor for a mechanic's lien must contain a description of the premises on which the improvement was erected. Such a description is not insufficient if it renders the location of the property susceptible of ready ascer-

tainment by the aid of extrinsic evidence. *Rosebud Lumber and Coal Company v. Holms* ..... 459
8. An overstatement of the amount due and sought to be recovered under a mechanic's lien does not, in the absence of a dishonest intention on the part of the claimant, invalidate the lien. *Rosebud Lumber and Coal Company v. Holms* ..... 459

**Mortgages.**
A deed is not to be held a mortgage unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage. *Dingwerth v. Assendrop* ..... 343

**Motor Carriers.**
1. Willful failure, as used in the Motor Carrier Act, is such behavior as justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform. *Safeway Cabs, Inc. v. Honer* ..... 418
2. The Motor Carrier Act defines a motor carrier to mean any person owning, controlling, managing, operating, or causing to be operated, any motor-propelled vehicle used in transporting passengers or property for hire over any public highway in this state. *Safeway Cabs, Inc. v. Honer* ..... 418
3. The term motor carrier, as defined in the Motor Carrier Act, is a term inclusive of both a common carrier and a contract carrier. *Safeway Cabs, Inc. v. Honer* ..... 418
4. The term motor carrier is intended to include those who have or are required to have either a certificate of public convenience and necessity as a common carrier or a permit as a contract carrier. *Safeway Cabs, Inc. v. Honer* ..... 418
5. A majority stockholder of a corporate motor carrier is not a motor carrier within the definition of motor carrier in the Motor Carrier Act. *Safeway Cabs, Inc. v. Honer* ..... 418

**Municipal Corporations.**
1. The streets of a municipality in this state belong to the public. An unauthorized obstruction or en-

cumbrance of them by a structure or otherwise constitutes a public nuisance. *Schroder v. City of Lincoln* ..... 599

2. The title of or right to hold the offices of city councilmen cannot be collaterally attacked as a ground for enjoining the enforcement of a city ordinance enacted by them. *Freeman v. City of Neligh* 651
3. The method prescribed by statute granting to cities of the second class power to pave or otherwise improve their streets is mandatory and jurisdictional, but when the governing boards of such municipalities act within the prescribed limitations thereof, they have power and authority to act thereunder. *Freeman v. City of Neligh* ..... 651
4. Detachment of land from a city may be denied where to detach would enhance the difficulties of city administration and would lessen the availability of contiguous urban areas for urban use. *Swanson v. City of Fairfield* ..... 682
5. The exercise of police power delegated to a municipal corporation cannot be invoked by it on purely aesthetic grounds. *City of Scottsbluff v. Winters Creek Canal Co.* ..... 732
6. In the exercise of police power, it is generally for the municipal authorities to determine what ordinances are required for the health, safety, and welfare of the people, but their action is not final and is subject to scrutiny of courts. *City of Scottsbluff v. Winters Creek Canal Co.* ..... 732
7. The test of the validity of a municipal police regulation in such cases is whether the ordinance in question is a bona fide exercise of police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation. *City of Scottsbluff v. Winters Creek Canal Co.* ..... 732
8. A legal presumption exists in favor of validity of a municipal police regulation. Unless the contrary appears upon the face of an ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that the regulation imposed is so arbitrary, unreasonable, or confiscatory as to amount to a denial of due process of law. *City of Scottsbluff v. Winters Creek Canal Co.* .... 732
9. A municipal ordinance enacted in the exercise of police power is not necessarily invalid because it infringes on private rights or property, but such in-

fringement should not be arbitrary, unreasonable, or confiscatory. *City of Scottsbluff v. Winters Creek Canal Co.* ..... 732

10. In passing upon the reasonableness of municipal ordinances, courts may consider the character of the regulation, the object to be accomplished, the means for its accomplishment, and all the relevant facts and circumstances of each particular case. *City of Scottsbluff v. Winters Creek Canal Co.* ..... 732
11. The exercise of police power by municipal corporations must be directed toward and have a rational relation to protection of a basic interest of society rather than the mere advantage of particular individuals, and must be reasonable and free from arbitrariness. *City of Scottsbluff v. Winters Creek Canal Co.* ..... 732
12. An ordinance which declares to be a nuisance that which is not but which may become such under certain circumstances should be directed against the circumstances which are harmful, and not against a particular type of property which, in itself and aside from the harmful circumstances, is not harmful. *City of Scottsbluff v. Winters Creek Canal Co.* ..... 732
13. The general power of a city to declare, prevent, or abate nuisances does not include the power to declare anything a nuisance which is not one in fact or per se. *City of Scottsbluff v. Winters Creek Canal Co.* .... 732
14. A city may not, without an authorizing election, issue revenue bonds to secure funds to pay for the construction of a complete electric light and power plant when it does not own such a plant and has not for many years owned or operated such a plant, but does own transmission lines and a distribution system. *Nacke v. City of Hebron* ..... 739
15. When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction. Where the law requires that the question shall be submitted to popular vote, an issue of bonds without such a vote will be enjoined. *Nacke v. City of Hebron* ..... 739
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burden of municipal taxation. *Martin v. City of Lincoln* ..... 845

17. A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay. *Martin v. City of Lincoln* ..... 845
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19. In an action by a taxpayer to enjoin municipal authorities from making illegal purchases the seller is not a necessary party. *Martin v. City of Lincoln* .... 845

Negligence.

1. A litigant injured in an accident who has placed himself in a position of peril is not entitled to an instruction under the last clear chance doctrine where it appears that he had the means at hand up to the time of the accident to have avoided injury. *Pope v. Tapelt* ..... 10
2. An action based on negligence for personal injuries may be prosecuted against the estate of a decedent. *In re Estate of Bingaman* ..... 24
3. An action for personal injury does not abate by reason of the death of the wrongdoer before the action is brought. *In re Estate of Bingaman* ..... 24
4. A person in the relationship of a fellow employee to another is not liable for negligent acts committed under the direction and control of the employer except for misfeasance or positive wrong. *In re Estate of Bingaman* ..... 24
5. Negligence is never presumed and cannot be inferred from the mere fact that an accident happened. *In re Estate of Bingaman* ..... 24
6. Gross negligence means negligence in a very high degree, or the absence of even slight care in the performance of a duty. *Sautter v. Poss* ..... 62
*Johnson v. Jastram* ..... 376
*Pavlicek v. Cacak* ..... 454
7. The duty of a guest riding in an automobile is to use ordinary care. Ordinarily, the guest need not watch the road or advise the driver in the management of the car. *Sautter v. Poss* ..... 62

8. When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable. *Sautter v. Poss* ..... 62

9. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of duty which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause. *Sautter v. Poss* ..... 62

10. The burden is upon defendant to prove the defense of contributory negligence and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect. *Sautter v. Poss* ..... 62
*Murray v. Pearson Appliance Store* ..... 860

11. The age when an infant may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury. *Adams v. Welliver* ..... 331

12. Whether or not an infant between nine and ten years of age may be subject to the defense of contributory negligence is generally a question of fact and not of law. *Adams v. Welliver* ..... 331

13. What is required of an infant is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. *Adams v. Welliver* ..... 331

14. The existence of gross negligence depends upon the facts and circumstances of each particular case. *Johnson v. Jastram* ..... 376

15. Ordinarily the question of gross negligence is one of fact for a jury, but if the evidence respecting it is not in conflict or is so conclusive that ordinary minds may not draw different conclusions therefrom the question is one of law for the court. *Johnson v. Jastram* ..... 376

16. A pedestrian is required to exercise a greater degree of care between intersections than at a crosswalk where protection is afforded by giving the pedestrian the right-of-way. *Wilson v. Wiggins* .... 382

17. One who crosses a street between intersections is required to keep a constant lookout in all directions

from which danger should reasonably be anticipated. *Wilson v. Wiggins* ..... 382

18. One who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law. *Wilson v. Wiggins* ..... 382

19. Unless some reasonable excuse is shown, one who is obligated to keep a lookout is required to see that which is in plain sight. Where he fails to do so, his negligence is sufficient to defeat a recovery. *Wilson v. Wiggins* ..... 382

20. Rules applicable stated under statute providing that every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk, or intersection shall yield the right-of-way to vehicles upon the highway. *Wilson v. Wiggins* ..... 382

21. In an action under the automobile guest statute a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence. *Pavlicek v. Cacak* ..... 454

22. The question of the existence of gross negligence must be determined from the facts and circumstances in each case. *Pavlicek v. Cacak* ..... 454

23. In the absence of statute, the ordinary rules of negligence obtain in respect to the maintenance and inspection of aircraft before flight by a private carrier when under agreement to carry a fare-paying passenger. *Scarborough v. Aeroservice, Inc.* ..... 749

24. Ordinary care is such care as the danger of the situation and the consequences that may follow an accident demand. It may be a high degree of care under some circumstances and a slight degree of care under other circumstances. *Scarborough v. Aeroservice, Inc.* ..... 749

25. Failure to exercise care in a situation which reasonably may be regarded as hazardous is negligence, notwithstanding the act or omission involved would not in all cases, or even ordinarily, be productive of injurious consequences. *Scarborough v. Aeroservice, Inc.* ..... 749

26. In determining the existence of the duty to exercise care, the risk reasonably to be perceived defines the duty to be obeyed. *Scarborough v. Aeroservice, Inc.* 749

27. A plaintiff is only required to satisfy the jury, by a preponderance of the evidence, that the injury occurred in the manner claimed and is not required to exclude other possibilities. *Scarborough v. Aeroservice, Inc.* ..... 749

28. Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances. *Murray v. Pearson Appliance Store* 860

29. The presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to exercise a degree of care commensurate with surrounding circumstances. *Murray v. Pearson Appliance Store* 860

30. Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do. *Murray v. Pearson Appliance Store* ..... 860
*Bussell v. McClellan* ..... 875

31. Rule with respect to duty of driver of motor vehicle to keep a proper lookout stated. *Murray v. Pearson Appliance Store* ..... 860

32. As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. *Murray v. Pearson Appliance Store* .... 860

33. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause. *Murray v. Pearson Appliance Store* 860

34. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *Murray v. Pearson Appliance Store* ..... 860

35. Under the comparative negligence law the words "slight" and "gross" as therein used are comparative terms. The intent of the statute is that the negligence of the parties will be compared one with the other in determining questions of slight and gross negligence. *Murray v. Pearson Appliance Store* .... 860

New Trial.

1. The ruling on a motion for a new trial for misconduct of the jury will not be disturbed on appeal where there is evidence to support it and the finding thereon is not clearly wrong. *Pope v. Tapelt* 10
2. Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial. *Pope v. Tapelt* 10
3. An order granting a new trial will be scrutinized in Supreme Court with the same care as one denying a new trial. *Sautter v. Poss* ..... 62
4. There is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented. *Sautter v. Poss* .... 62
5. If the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant to present those reasons and in appropriate manner support his contentions. The appellee has then the duty, if he desires, of meeting those contentions, and has the right to submit additional reasons to sustain the trial court's judgment. *Sautter v. Poss* ..... 62
6. In order to review errors of law which allegedly occurred during the trial of a workmen's compensation case, a motion for a new trial must be timely filed assigning such errors therein. The errors must also be subsequently assigned and discussed in the brief filed in the Supreme Court on appeal, or they will not ordinarily be considered. *Peek v. Ayres Auto Supply* ..... 233
7. A motion for new trial is not a necessary prerequisite in a workmen's compensation case in order for the Supreme Court to search the record, try the case de novo thereon, and render such judgment as should have been rendered. *Peek v. Ayres Auto Supply* .... 233
8. Affidavits in support of a motion for new trial which are not embodied in a bill of exceptions will not be

considered on appeal. *Nebraska Methodist Hospital v. McCloud* ..... 500

9. An exception to a group of instructions collectively in a motion for a new trial are deemed for the purpose of review in Supreme Court as a separate exception to each instruction included within the group. *Danielson v. State* ..... 890
10. The exceptions taken to a group of instructions in a petition in error need be no more specific than required in a motion for a new trial. *Danielson v. State* ..... 890
11. Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown. *Schreiner v. State* ..... 894

Nuisances.

1. An action for an injunction to restrain or abate a continuing nuisance may be maintained by any person who suffers damage or injury thereby. An injured party may recover such damages in the injunction action as he may have sustained by such wrongful act. *Brchan v. The Crete Mills* ..... 505
2. The streets of a municipality in this state belong to the public. An unauthorized obstruction or encumbrance of them by a structure or otherwise constitutes a public nuisance. *Schroder v. City of Lincoln* 599
3. A private individual may not maintain an action to enjoin a public nuisance unless he will or has sustained some special injury therefrom distinct and different in kind from that which he will or does suffer in common with the rest of the public. *Schroder v. City of Lincoln* ..... 599
4. A public nuisance, if committed without authority, can be remedied by a public prosecution or other available proceedings instituted by the proper officer on behalf of the people. *Schroder v. City of Lincoln* 599
5. An ordinance which declares to be a nuisance that which is not but which may become such under certain circumstances should be directed against the circumstances which are harmful, and not against a particular type of property which, in itself and aside from the harmful circumstances, is not harmful. *City of Scottsbluff v. Winters Creek Canal Co.* ..... 732

6. The general power of a city to declare, prevent, or abate nuisances does not include the power to declare anything a nuisance which is not one in fact or per se. *City of Scottsbluff v. Winters Creek Canal Co.* ..... 732

7. Where an irrigation canal or ditch has been constructed and operated in conformity with law, it is not a nuisance in fact or per se, and can only become one by reason of the manner in which it is maintained and operated. The mere fact that a municipality subsequently includes the same within its city limits does not convert such canal or ditch into a nuisance. *City of Scottsbluff v. Winters Creek Canal Co.* ..... 732

**Officers.**

1. When an increase or decrease in compensation occurs during an officer's term because of a change in population after his election, such increase or decrease in compensation does not violate the constitutional provision that the compensation of a public officer shall not be increased or diminished during his term. *Hamilton v. Foster* ..... 89

2. A citizen who is actually called into service by the sheriff under statutory authority and assists him as a deputy under color of an appointment is an officer de facto, although his appointment was not made with the formalities required by statute. *Anderson v. Bituminous Casualty Co.* ..... 590

3. Where there has been an expenditure of the funds of a Class II school district which expenditure was unlawful for want of power, the officers or members of the board who by their act or acts gave efficacy to the expenditure are liable therefor to the district. *Fulk v. School District* ..... 630

4. Offices are created for the benefit of the public and for the good order and peace of society. The authority of officers is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. *Freeman v. City of Neligh* ..... 651

5. The title of or right to hold the offices of city councilmen cannot be collaterally attacked as a ground for enjoining the enforcement of a city ordinance enacted by them. *Freeman v. City of Neligh* ..... 651

**Parent and Child.**

1. Parents have a natural right to the custody of their children unless they are affirmatively shown to be unfit. *Lung v. Frandsen* ..... 255
2. The courts may not properly deprive the parents of the custody of their children unless it be shown that they are unfit to perform the duties imposed by the relation or that they have forfeited that right. *Lung v. Frandsen* ..... 255
3. The amount which a defendant in a paternity proceeding will be required to pay for the support of his child is in the discretion of the district court. The award will not be disturbed unless discretion has been abused and it is manifestly excessive. *Race v. Mrsny* ..... 679

**Partnership.**

1. Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions. *Peterson v. Massey* ..... 829
2. The burden of establishing the existence of either a joint enterprise or a partnership is upon the party asserting that the relationship exists. *Peterson v. Massey* ..... 829

**Physicians and Surgeons.**

1. Osteopathy may, in general terms, be defined as the treatment of human ills by means of manipulative therapy as distinguished from the treatment of such ills through the use of drugs and operative surgery by physicians and surgeons. *Morgan v. State* ..... 247
2. A licensed osteopath in this state is authorized to practice osteopathy in all of its branches as taught in osteopathic colleges recognized by the American Osteopathic Association; to perform surgery as it is taught and used as a part of the osteopathic system, but not including operative surgery with surgical instruments; and to practice obstetrics and use anesthetics. *Morgan v. State* ..... 247

**Pleading.**

1. A motion for judgment on the pleadings admits the facts well pleaded by the adversary and all reasonable inferences resulting from them, but does not

admit conclusions. Allegations controverted are not admitted. *Anderson v. Anderson* ..... 1
2. Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or a matter to avoid, will be treated as admitted, though the answer also contains his general denial. *Anderson v. Anderson* ..... 1
3. When a plaintiff pleads a fact which is material to the issue being tried, he thereby assumes the burden of proving the existence of such fact. *Hammer v. Estate of Hammer* ..... 303
4. Where by statute plaintiff is authorized to plead general performance of all conditions precedent in a contract, defendant must, if he relies upon the fact that any of the conditions precedent have not been performed, set out specifically the condition and the breach. *Cartwright and Wilson Constr. Co. v. Smith* ..... 431
5. A general demurrer admits the truth of all alleged material facts and the reasonable inferences to be drawn therefrom. *Martin v. City of Lincoln* ..... 845

**Process.**

1. Publication of a notice in a newspaper three weeks successively is accomplished by publication on one day of each of three weeks, that is, three successive weekly publications. *Johnson v. Richards* ..... 552
2. Publication of notice three weeks successively is complete upon the distribution of the last issue of the paper containing the notice though three full weeks did not elapse after the first publication. *Johnson v. Richards* ..... 552
3. Supreme Court's construction of the statute providing for notice of the time and place of proving a will was not changed or affected by statute defining "week." *Johnson v. Richards* ..... 552
4. Statute regulating publication of legal notices does not refer to the period during which a notice or legal publication must be published but it was intended to and does limit the number of issues in which the notice must appear when the medium of publication has more than one regular issue each week. *Johnson v. Richards* ..... 552

**Property.**

1. The word "possessions" may include real estate if so intended, although such is not its technical meaning. *Jacobsen v. Farnham* ..... 776

2. The words "all my worldly possessions" are ordinarily sufficient, if not qualified, to mean real estate; but it is otherwise if it appears from the context that personal estate only was in contemplation of the testator. *Jacobsen v. Farnham* ..... 776

**Public Service Commissions.**

1. A final order of the railway commission granting or denying a railroad company permission to discontinue an agency at a particular station is unreasonable and arbitrary unless its findings and conclusions conform to the law and are supported by the evidence. *Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers* ..... 387
*Chicago, B. & Q. R. R. Co. v. Village of Bingham* 392
2. It is arbitrary and unreasonable to require the maintenance of a full-time agency the year around at a station where the principal business is seasonal carload shipments, and the cost of such service is out of proportion to the revenue derived from that portion of the public benefited thereby. *Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers* .... 387
*Chicago, B. & Q. R. R. Co. v. Village of Bingham* 392
3. On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *Safeway Cabs, Inc. v. Honer* ..... 418
4. Willful failure, as used in the Motor Carrier Act, is such behavior as justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform. *Safeway Cabs, Inc. v. Honer* .... 418

**Quieting Title.**

In actions to quiet title and to enforce legacies, the district court has jurisdiction to construe a will. *Jacobsen v. Farnham* ..... 776

**Quo Warranto.**

1. Quo warranto or a proceeding in the nature thereof lies only against one who is in possession and user

of the office or who had been admitted thereto. *State ex rel. Larson v. Morrison* ..... 309

2. When it is claimed that a school district has no existence as such because not created in the manner required by statute, the cause must proceed against the individuals who are usurping its franchises. *State ex rel. Larson v. Morrison* ..... 309

3. Quo warranto is a proper remedy whereby to test the legal entity of a school district and the status of its officers. *State ex rel. Larson v. Morrison* 309

**Railroads.**

1. A final order of the railway commission granting or denying a railroad company permission to discontinue an agency at a particular station is unreasonable and arbitrary unless its findings and conclusions conform to the law and are supported by the evidence. *Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers* ..... 387
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*Chicago, B. & Q. R. R. Co. v. Village of Bingham* 392

**Rape.**

In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. *Schreiner v. State* ..... 894

**Reformation of Instruments.**

1. Formal reformation of a written instrument is unnecessary in order to enforce it or have the advantage of it as a defense as it should have been expressed in the writing. *Garbark v. Newman* .... 188

2. In order to warrant the reformation of a written instrument, the evidence must be clear, convincing, and satisfactory, and until overcome by such proof, the terms of the instrument must stand. *Lovenburg v. Justice* ..... 406
3. Reformation of an instrument to correct a mistake will not be accorded unless the intent and agreement which it will express as reformed were concurrent in the minds of the parties to and including the time of its execution. *Lovenburg v. Justice* ..... 406

**Release.**

Misrepresentation of a material fact made by a person representing a releasor and relied and acted upon by him does not constitute a basis for avoidance of the release of a claim for personal injuries unless the misrepresentation was also made on the authority or with the knowledge of the releasee. *Wagoun v. Chicago, B. & Q. R. R.* ..... 132

**Replevin.**

1. The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time. *Bank of Keystone v. Kayton* ..... 79
2. The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced. *Bank of Keystone v. Kayton* ..... 79
3. A plaintiff in a replevin case must recover on the strength of his right in or to the property and not upon any weakness of the interest of the defendant therein. *Bank of Keystone v. Kayton* ..... 79

**Sales.**

1. A positive statement of a seller of the condition of personal property indicating his intention to be bound for the truth thereof, and which was so understood and relied upon by the other party, is an express warranty. *Garbark v. Newman* ..... 188
2. Where rescission of a sale of goods is based on a false representation of quality, condition, or matter affecting its value, the purhcaser must show that the representation was material and that he was misled thereby to his damage. *Garbark v. Newman* 188

3. Generally rescission of a sale of a chattel must be made by the seller giving notice to the buyer of his election to rescind and a return of or offer to return the property to him at the place where it was received by the seller. *Garbark v. Newman* .... 188
4. If a buyer of a chattel is entitled to rescind the sale and elects to do so, and if the seller refuses to accept an offer of the buyer to return the goods, the buyer is thereafter presumed to hold the goods as bailee for the seller subject to a lien to secure the repayment of the price paid. *Garbark v. Newman* .... 188
5. Under the Uniform Sales Act, if a buyer of an automobile for legal cause rescinds the purchase and the seller refuses the offer of return of the vehicle, the buyer becomes a bailee for hire of the property, subject to a lien to secure repayment of the price paid, and is entitled to reasonable compensation from the seller for its care and protection. The buyer may in such a situation place the property in storage, and if he does, the seller is liable for and may be required to pay the reasonable storage charges as a prerequisite of his securing possession of the property. *Garbark v. Newman* ..... 188
6. The provision of the Uniform Sales Act that the buyer or seller may recover special damages in any case permitted by law authorizes the recovery of special damages without regard to whether the transaction to which they are incidental has been rescinded or affirmed. *Garbark v. Newman* ..... 188
7. Generally if a buyer sues for general damages for breach of the contract of sale, he affirms the contract and cannot thereafter disaffirm it. An exception to, or a situation without the operation of, this rule may exist if one expends money or furnishes material in the improvement of property before discovering the fraud by which he was induced to purchase it. In such a case the buyer may rescind the contract of sale and also recover the reasonable cost of improving the property or of the repairs made thereon. *Garbark v. Newman* ..... 188

**Schools and School Districts.**

1. When it is claimed that a school district has no existence as such because not created in the manner required by statute, the cause must proceed against the individuals who are usurping its franchises. *State ex rel. Larson v. Morrison* ..... 309

2. Quo warranto is a proper remedy whereby to test the legal entity of a school district and the status of its officers. *State ex rel. Larson v. Morrison* .... 309
3. The statute prescribing the method of changing the boundaries of a school district is mandatory and jurisdictional. *State ex rel. Larson v. Morrison* .... 309
4. Any signer of a petition to create a new school district from other districts or to change the boundary of any district may withdraw his signature therefrom at any time before the county superintendent has affirmatively acted upon such petition by authoritatively declaring the district created or change made. *State ex rel. Larson v. Morrison* ..... 309
5. A contract to teach entered into by a school board with a teacher who does not qualify by certificate as required by law to teach in the particular type of district involved is invalid and unenforceable. *Kuhl v. School District* ..... 357
6. School boards of Class II school districts are creatures of statute with power to bind the district only within the limits fixed by the Legislature. *Fulk v. School District* ..... 630
7. A Class II school district is a creature of statute possessing no powers to contract beyond those granted by the Legislature. *Fulk v. School District* .... 630
8. In case a Class II school district enters into a contract without the power granted by the Legislature such contract may be declared void and invalidated in an appropriate action. *Fulk v. School District* ..... 630
9. Power of a Class II school district may not flow from emergency, but only from a statutory grant. *Fulk v. School District* ..... 630
10. Within the meaning of the statutes governing Class II school districts the purchase of a residence for the superintendent of schools does not come within the powers granted. *Fulk v. School District* ..... 630
11. Where action of a school district is illegal and void not for lack of power but for failure to properly exercise power which exists, the district is bound to the extent that it has received the benefits of the action. *Fulk v. School District* ..... 630
12. Where action of a school district is ultra vires and there is no power to act in the premises at all no liability may be imposed upon the district. *Fulk v. School District* ..... 630

13. Where a sale of real estate has been made to a Class II school district which was void for the reason that the district was without power to make the purchase the seller is under a legal obligation to restore the consideration received to the district. *Fulk v. School District* ..... 630

14. Where there has been an expenditure of the funds of a Class II school district which expenditure was unlawful for want of power, the officers or members of the board who by their act or acts gave efficacy to the expenditure are liable therefor to the district. *Fulk v. School District* ..... 630

15. To authorize issuance of bonds for the purpose of building a new school building and securing the necessary furniture and apparatus for same, the vote of 55 percent of all qualified electors of the school district voting on the proposition in favor thereof is required. *Greathouse v. School Distrit* 883

16. Under School Bond Issue Act, requiring a proposal for the issuance of school bonds to be adopted by 55 percent of the ballots cast at the election by qualified electors of the school district on the question, ballots improperly cast or rejected for illegality cannot be counted in determining the vote cast. *Greathouse v. School District* ..... 883

17. In the absence of statutory provision to the contrary, ballots which have been cast in a school district election which are entitled by law to be counted in declaring the result of the election shall alone be counted in determining the vote cast. *Greathouse v. School District* ..... 883

**Sheriffs and Constables.**

1. A sheriff is given authority to call a private citizen into the service of the county to aid him in law enforcement. *Anderson v. Bituminous Casualty Co.* 590

2. When a private citizen is impressed into service by the sheriff, a contract of employment with the county results. The county so employing a citizen becomes liable to him for the reasonable value of the services he renders at the direction of the sheriff. *Anderson v. Bituminous Casualty Co.* ..... 590

**Specific Performance.**

Burden and elements of proof stated where party seeks specific performance of an oral contract for

the conveyance of land of a deceased person. *Nelson v. Glidewell* ..... 372

Statutes.

1. Statutes prescribing proceedings for the condemnation of property must be strictly construed against the condemnor and in favor of the landowner. *Webber v. City of Scottsbluff* ..... 48
2. Eminent domain statute should not be so strictly construed as to defeat the purpose sought to be accomplished. *Webber v. City of Scottsbluff* ..... 48
3. Existing statutes and laws with reference to which a contract is made enter into and become part thereof, subject to appropriate legislative limitations subsequently enacted under the police power of the state, and such principle embraces alike those which affect its validity, construction, discharge, and enforcement. *Faught v. Platte Valley Public Power & Irrigation Dist.* ..... 141
4. When a statute prescribes a duty and a contract is made involving performance of that duty, such statute becomes a part of the contract. Where the law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts providing for the public service. *Faught v. Platte Valley Public Power & Irrigation Dist.* ..... 141
5. Under the County Budget Act, the prohibition against creating indebtedness does not relate to the condition of the budget at the time a claim is filed or acted on by the board but to the time the contract is entered into or liability incurred for any of the purposes for which provision is made in the budget. *Becker v. County of Platte* ..... 180
6. In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found. The intent so deduced from the whole will prevail over that of a particular part considered separately. *Allen v. Tobin* ..... 212
7. The fundamental principle of statutory construction is to ascertain the intent of the Legislature and to discover that intent from the language of the act itself. It is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language. *Allen v. Tobin* 212

8. The Liquor Control Act is to be liberally construed. *Allen v. Tobin* ..... 212
9. In construing a statute, effect must be given, if possible, to every word, clause, and sentence, so that no part of its provisions will be inoperative, superfluous, void, or insignificant. *Safeway Cabs, Inc. v. Honer* ..... 418
10. When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted. *Safeway Cabs, Inc. v. Honer* ..... 418
11. Statutes are not to be understood as effecting any change in the common law beyond that which is clearly indicated. *Strauel v. Peterson* ..... 448
12. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning. *Franzen v. Blakley* ..... 621
13. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. *Franzen v. Blakley* ..... 621
14. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Franzen v. Blakley* ..... 621
15. It is not within the province of a court to read plain, direct, and unambiguous language out of a statute. *Franzen v. Blakley* ..... 621
16. If possible, the entire statute is to be applied as written. *Franzen v. Blakley* ..... 621
17. If the words used in a legislative act had, at the time used, received a settled construction, the Supreme Court will presume that the Legislature adopted them in that sense. *Franzen v. Blakley* .... 621
18. It is to be presumed that the Legislature in using language in a statute will give it the same significance that has already been accorded it by the Constitution and laws of the state, unless a different meaning is provided in the enactment itself or must be drawn from its context. *Franzen v. Blakley* .... 621
19. In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will. *Nacke v. City of Hebron* ..... 739

20. Sections 4 and 5 of the Blanket Mill Tax Levy Act are unconstitutional because of lack of uniformity. *Peterson v. Hancock* ..... 801
21. Invalid portions of Blanket Mill Tax Levy Act are so connected with remainder that entire act is unconstitutional. *Peterson v. Hancock* ..... 801
22. Blanket Mill Tax Levy Act is not unconstitutional for defect of title. *Peterson v. Hancock* ..... 801

**Tender.**

The law does not require vain things, and a formal tender of property is not required if it appears that it would have been futile. *Garbark v. Newman* .... 188

**Time.**

1. Supreme Court's construction of the statute providing for notice of the time and place of proving a will was not changed or affected by statute defining "week." *Johnson v. Richards* ..... 552
2. Statute regulating publication of legal notices does not refer to the period during which a notice or legal publication must be published but it was intended to and does limit the number of issues in which the notice must appear when the medium of publication has more than one regular issue each week. *Johnson v. Richards* ..... 552

**Trial.**

1. A motion for judgment on the pleadings admits the facts well pleaded by the adversary and all reasonable inferences resulting from them, but does not admit conclusions. Allegations controverted are not admitted. *Anderson v. Anderson* ..... 1
2. A litigant may withdraw his motion for a mistrial because of the admission of prejudicial evidence at any time prior to the court's ruling thereon. *Pope v. Tapelt* ..... 10
3. Matters of supposition or opinion on the part of jurors while deliberating inhere in the jury's verdict and are not competent to be shown in an attempted impeachment of a verdict. *Pope v. Tapelt* ..... 10
4. Circumstantial evidence is insufficient to sustain a verdict or to require submission of a case to a jury unless the circumstances proved by the evidence are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom. *In re Estate of Bingaman* ..... 24

5. A motion for judgment notwithstanding the verdict requires the trial court to re-examine the legal sufficiency of the entire evidence to sustain the verdict and judgment, and if it is found insufficient, to render a proper judgment notwithstanding the verdict and judgment previously rendered. *In re Estate of Bingaman* ..... 24

6. It is the duty of the district court to direct a verdict and render a judgment thereon if but one conclusion can reasonably be deduced from all the evidence in the case. *Kessler v. Bates & Rogers Construction Co.* ..... 40

7. The burden is upon defendant to prove the defense of contributory negligence and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect. *Sautter v. Poss* ..... 62

8. The test to be applied in determining the validity of a quotient verdict is whether the jury agreed beforehand to be bound by the result reached. *Spreitzer v. State* ..... 70

9. No affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict. *Spreitzer v. State* ..... 70

10. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. *Spreitzer v. State* ..... 70

11. It is proper to charge, and error to refuse to charge, that a reasonable doubt may arise either from the evidence or from a want of evidence, and that the absence of sufficiently satisfying evidence may be a ground for a reasonable doubt of defendant's guilt. *Spreitzer v. State* ..... 70

12. In passing upon the validity of part of an instruction, it must be considered not only in the light of all the language used in the particular instruction of which it is a part, but also all other instructions given by the trial court. *Spreitzer v. State* ..... 70

13. Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in the Supreme Court although the plaintiff filed no reply either before or after judgment. *Central Construction Co. v. Highsmith* ..... 113

14. Action of the district court in making findings of fact not pleaded and basing judgment thereon is prejudicially erroneous. *Miller v. City of Scottsbluff* ..... 185

15. Findings of court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment entered thereon will not be disturbed unless clearly wrong. In a non-jury law action, the findings of the court have the effect of a verdict of a jury and will not be disturbed unless clearly wrong. *Cotner College v. Estate of Hester* ..... 279

16. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. *Stolting v. Everett* ..... 292
*Pavlicek v. Cacak* ..... 454

17. Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony. *Stolting v. Everett* 292

18. Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit. *Hammer v. Estate of Hammer* ..... 303
*McLeod v. Andrew Murphy & Son, Inc.* ..... 318

19. The instructions to the jury, when considered and construed together, fairly stated the law applicable to the issues raised by the pleadings and proofs. *Adams v. Welliver* ..... 331
*Cartwright and Wilson Constr. Co. v. Smith* ..... 431

20. If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion, to set aside the verdict, and to render judgment pursuant to the motion for directed verdict. *Pavlicek v. Cacak* ..... 454

21. In ruling on a defendant's motion to dismiss at the conclusion of the plaintiff's case, the evidence will be considered by the court in the light most favorable to the plaintiff. Controverted facts will be resolved in his favor, and he is entitled to the benefit of every inference that can be reasonably deduced therefrom. *Rosebud Lumber and Coal Company v. Holms* ..... 459

22. In an equity suit where a motion to dismiss at the conclusion of plaintiff's evidence was improperly sustained, the cause should be remanded for a new trial. *Rosebud Lumber and Coal Company v. Holms* ..... 459
23. A litigant cannot trifle with the processes of the court by asserting under oath at different times the truth of each of two or more contradictory versions of an event or events in controversy according to the necessities of the particular occasion presenting itself. *Rahfeldt v. Swanson* ..... 482
24. In a will contest on the ground of mental incompetency and undue influence, the trial court should withdraw both issues from the jury and direct a verdict or discharge the jury and render judgment for proponents where the evidence is insufficient to sustain a verdict upon neither of such issues in favor of contestants. *Nebraska Methodist Hospital v. McCloud* ..... 500
25. Where instructions are asked which are not applicable to any controverted issue presented by the pleadings and evidence, they should be refused. *Klinginsmith v. Allen* ..... 674
26. A party must, in preparing for trial, proceed on the assumption that his adversary will produce evidence to support his contention. *Glissmann v. Grabow* .... 690
27. A motion for a directed verdict admits for the purpose of decision the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can be reasonably deduced from the facts in evidence. *Scarborough v. Aeroservice, Inc.* ..... 749
28. Circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances are such that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Scarborough v. Aeroservice, Inc.* 749
29. The meaning of an instruction, not the phraseology, is the important consideration. A claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear. *Scarborough v. Aeroservice, Inc.* ..... 749
30. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and

the other instructions, and the true meaning thereof will be determined by a consideration of all that is said on the subject. *Scarborough v. Aeroservice, Inc.* ..... 749

31. It is not error to refuse requested instructions when the substance of them is given by the court in its instructions to the jury. *May v. State* ..... 786

32. Generally in the initial instructions it is not necessary to instruct the jurors as to their right to disagree. *May v. State* ..... 786

33. It is not error to refuse an instruction which has the effect to withdraw from the consideration of the jury competent material evidence in the case. *May v. State* ..... 786

34. A defendant is entitled to test the sufficiency of plaintiff's evidence without the risk of penalizing himself. *Peterson v. Massey* ..... 829

35. When a defendant demurs to the evidence or moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's testimony to be true together with every conclusion which may be reasonably drawn therefrom. *Peterson v. Massey* ..... 829

36. When a demurrer to the evidence is sustained the case is ready for judgment. *Peterson v. Massey* .... 829

37. If, on appeal, it is determined that the trial court erroneously sustained either a demurrer to the evidence or a motion to dismiss, both parties are entitled to be placed in the same position they were in before the error occurred. *Peterson v. Massey* ..... 829

38. In the trial of an action at law where a jury is waived the findings of fact have the same effect as the verdict of a jury. *Flaherty v. Carskadon* ..... 853

39. The findings of fact in a law action where a jury has been waived will not be disturbed unless they are clearly wrong. *Flaherty v. Carskadon* ..... 853

40. A trial court may properly refuse tendered instructions which are covered by instructions given on its own motion. *Danielson v. State* ..... 890

41. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered in Supreme Court unless such ruling is first challenged by motion for a new trial. *Schreiner v. State* ..... 894

42. An oral statement or communication by the court to the jury, which is rather in the nature of a cautionary direction, and not fairly and strictly a direction or instruction upon some question or rule of

law involved in or applicable to the trial, need not be in writing. *Schreiner v. State* ..... 894

**Trusts.**

1. The burden of proof is upon one seeking to establish and enforce a constructive trust to establish the same by a preponderance of evidence, clear, satisfactory, and convincing in character. *Wiskocil v. Kliment* ..... 103
2. Where one employed to act as agent for another in the purchose of real estate becomes the purchaser himself, he will be considered in equity as holding the property for his principal as upon a constructive trust, although he purchased with his own money subject to reimbursement for his proper expenditures in that behalf. *Wiskocil v. Kliment* ..... 103
3. The statute of frauds does not apply to a constructive trust. *Wiskocil v. Kliment* ..... 103
4. Where property is transferred to another subject to the payment of a certain sum to a third person, an equitable charge and not a trust is created. Where property is transferred to another with direction to pay to a third person a certain sum out of the property or its proceeds, a trust and not an equitable charge is created. *Dahlke v. Dahlke* ..... 169
5. In the case of an equitable charge, the person having title to property holds it subject to an equitable interest in another person, and the equitable encumbrancer has an equitable lien thereon. The person who holds subject to the charge is the owner of the property, subject only to the lien. *Dahlke v. Dahlke* 169
6. If, by the terms of a trust, an interest passes to the beneficiary during the life of the settlor, although the interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not ordinarily a testamentary trust, the disposition is not testamentary, and the intended trust is valid. *Dahlke v. Dahlke* ..... 169
7. It is the duty of a trustee to fully inform the cestui que trust of all facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material to the cestui que trust to know for the protection of his interests. *Johnson v. Richards* ..... 552
8. Every violation by a trustee of a duty required of him by law, whether willful and fraudulent, or done through negligence, or arising through mere over-

sight or forgetfulness, is a breach of trust. *Johnson v. Richards* ..... 552

9. The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing. *Peterson v. Massey* ..... 829

10. No resulting trust necessarily arises in favor of a person furnishing the consideration for the purchase of property taken in the name of another, where the parties were sufficiently close so as to give rise to the presumption that a gift was intended. Where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift. *Peterson v. Massey* ..... 829

11. An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual services rendered him outside of her domestic duties is valid, and, when established by a preponderance of the evidence, is enforceable as against him or his estate. *Peterson v. Massey* .... 829

**Usury.**

A loan made at a place of business in violation of the Small Loan Act is void and uncollectible. *Grand Island Finance Co. v. Eacker* ..... 546

**Vendor and Purchaser.**

In the construction of every instrument for the conveyance of real estate or any interest therein, it is the duty of courts to carry into effect the true intent of the parties so far as such intent can be ascertained from the whole instrument and it is consistent with rules of law. *Dahlke v. Dahlke* ..... 169

**Waters.**

1. The right to use water for irrigation purposes may be acquired by contract with a common carrier irrigation corporation, and such contracts are generally governed by the same rules which pertain to other contracts. *Faught v. Platte Valley Public Power & Irrigation Dist.* ..... 141

2. A construction conferring a right in perpetuity will be avoided unless compelled by unequivocal language of the contract. A contract will not be construed as imposing a perpetual obligation when to

do so would be adverse to public interests. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141

3. A purchaser of land is not personally liable for a maintenance fee provided for in a water right contract between the grantor and an irrigation company, and, for want of privity of estate, an action cannot be maintained against him to recover a personal judgment therefor. *Faught v. Platte Valley Public Power & Irrigation Dist.* ..... 141
4. An agreement to pay an irrigation corporation maintenance charges as consideration for the right to use irrigation water upon land is not a covenant running with the land in the absence of privity of estate. *Faught v. Platte Valley Public Power & Irrigation Dist.* ..... 141
5. An irrigation corporation does not become the owner or proprietor of the water that it conveys as a public commodity. It is only the servant of the public to carry it to the land for which it has been appropriated, and in such respect stands on the same footing as a common carrier. *Faught v. Platte Valley Public Power & Irrigation Dist.* .... 141
6. No private estate can be created in property belonging to the public or devoted to a public use. A consumer of irrigation water cannot have a water right in the sense that it is a private freehold interest in the real estate of the distributing irrigation corporation. *Faught v. Platte Valley Public Power & Irrigation Dist.* ..... 141
7. The exercise and enjoyment of a right of service do not create an easement in the property. *Faught v. Platte Valley Public Power & Irrigation Dist.* 141
8. A contract with an irrigation corporation for the use of water is executed with reference to the statutes and laws prescribing its authority, which become a part of the contract. The subsequent purchase of such corporation by a public power and irrigation district does not of itself make the statutes and laws under which it was authorized to organize and operate a part of the original contract. *Faught v. Platte Valley Public Power & Irrigation Dist.* ..... 141
9. An original action in equity is an appropriate and permissible remedy to exclude or detach land unlawfully included in the area of an irrigation district. *Smith v. Frenchman-Cambridge Irrigation Dist.* ..... 270

10. Land, provided with water by pump for its irrigation, may not be included in an irrigation district except upon written application or consent of the owner thereof. *Smith v. Frenchman-Cambridge Irrigation Dist.* ..... 270
11. Whether or not land is provided with water by pump for its irrigation is a question which may be investigated and determined at any time in a proper case. *Smith v. Frenchman-Cambridge Irrigation Dist.* ..... 270
12. If land is nonirrigable because of natural causes, it cannot lawfully be included or held in an irrigation district and taxed to support an irrigation system. *Smith v. Frenchman-Cambridge Irrigation Dist.* ..... 270
13. Whether or not land, from some natural cause, cannot be irrigated is a question which may be put in issue and determined at any time in a proper case. *Smith v. Frenchman-Cambridge Irrigation Dist.* ..... 270
14. Whether land cannot from any natural cause be irrigated must be determined from the facts in each case. No general and invariable rule to determine that fact can be stated. *Smith v. Frenchman-Cambridge Irrigation Dist.* ..... 270
15. A riparian owner may not embank against the overflow of running streams when the effect is to cause an increased volume of water on the land of another riparian owner to his injury, and if he does so he is answerable in damages. *Stolting v. Everett* 292
16. In an action for damages by floodwaters of a stream allegedly caused by the negligent construction of jetties and a dike, the burden of proof is on the plaintiffs to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages caused thereby. *Stolting v. Everett* ..... 292
17. Where an irrigation canal or ditch has been constructed and operated in conformity with law, it is not a nuisance in fact or per se, and can only become one by reason of the manner in which it is maintained and operated. The mere fact that a municipality subsequently includes the same within its city limits does not convert such canal or ditch into

a nuisance. *City of Scottsbluff v. Winters Creek Canal Co.* ..... 732

18. Statutory exemption from liability is limited to the owner of the land whereon an open ditch or tile drain may be discharged into a natural watercourse or natural depression or draw. *Bussell v. McClellan* 875

19. A proprietor of real estate may fight surface waters as he deems best. In fighting them an upper proprietor may not (1) accumulate them into a ditch or drain, increase the flow, and discharge them in volume on a lower or servient estate; or (2) divert them in a different direction to the damage of the lower or servient estate. *Bussell v. McClellan* ..... 875

20. Where surface water flows in a well-defined course, whether the course be ditch, swale, or drain in its primitive condition, the flow cannot be arrested or interfered with to the injury of neighboring proprietors. *Bussell v. McClellan* ..... 875

**Wills.**

1. In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law. *Dumond v. Dumond* ..... 204
*Jacobsen v. Farnham* ..... 776

2. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. *Dumond v. Dumond* 204

3. A patent ambiguity in a will is one which appears upon the face of it. Such an ambiguity must be removed by interpretation according to legal principles and not by evidence, and the intention of the testator must be found within the four corners of the will. *Dumond v. Dumond* ..... 204
*Jacobsen v. Farnham* ..... 776

4. The intention of the testator by a devise of "one undivided half one half interest in my farms" was to vest an undivided one-half interest in the lands described in each of two specifically named devisees. *Dumond v. Dumond* ..... 204

5. An attorney may testify to factual matters relating to the execution of a will but anything in the nature of a communication is privileged and inadmissible unless waived. *Nelson v. Glidewell* ..... 372

6. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon neither of such issues in favor of the contestants, the trial court should withdraw both issues from the jury and direct a verdict or discharge the jury and render judgment for proponents. *Nebraska Methodist Hospital v. McCloud* ..... 500
7. In actions to quiet title and to enforce legacies, the district court has jurisdiction to construe a will. *Jacobsen v. Farnham* ..... 776
8. In determining a testator's intention, the court must examine a will in its entirety, giving consideration to every provision, giving words used their commonly and generally accepted meaning, and indulging the presumption that testator understood the meaning of the words used. *Jacobsen v. Farnham* ..... 776
9. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will where a claimed ambiguity is patent and not latent. *Jacobsen v. Farnham* ..... 776
10. When an instrument consists partly of written form, whether in script or typewriting, and partly of printed form, the former controls the latter where the two are inconsistent. *Jacobsen v. Farnham* .... 776
11. Any technical distinction between the words "devise" and "bequeath" will not be permitted to defeat the purpose of a testator, since they may be construed interchangeably or applied indifferently to either real or personal property if the context shows that such was the intent of the testator. *Jacobsen v. Farnham* ..... 776
12. The word "possessions" may include real estate if so intended, although such is not its technical meaning. *Jacobsen v. Farnham* ..... 776
13. The words "all my worldly possessions" are ordinarily sufficient, if not qualified, to mean real estate; but it is otherwise if it appears from the context that personal estate only was in contemplation of the testator. *Jacobsen v. Farnham* ..... 776
14. It is a natural presumption that a testator making his will intended to dispose of his whole estate and not to die intestate as to any part of it. In construing doubtful expressions this presumption has weight, but it cannot supply the actual intent of

the testator to be derived from the language of the will. *Jacobsen v. Farnham* ..... 776

15. The presumption that a testator intended by his will to fully dispose of his estate will not overcome the rule requiring express provision or necessary implication to disinherit an heir. *Jacobsen v. Farnham* ..... 776

16. Real estate not disposed of by will becomes intestate property and descends to the heirs at law of the testator. *Jacobsen v. Farnham* ..... 776

**Witnesses.**

1. A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a special contract, entitled only to the statutory fee. *Peek v. Ayres Auto Supply* ..... 233

2. When two or more persons employ the same attorney in relation to the same business their communications are not privileged between themselves where the disclosures are made in the presence of all parties concerned or are intended for the information of all parties. *Nelson v. Glidewell* ..... 372

3. The credibility of witnesses and the weight of their testimony are for the jury to determine. *May v. State* ..... 786

**Work and Labor.**

1. Where action of a school district is illegal and void not for lack of power but for failure to properly exercise power which exists, the district is bound to the extent that it has received the benefits of the action. *Fulk v. School District* ..... 630

2. Where action of a school district is ultra vires and there is no power to act in the premises at all no liability may be imposed upon the district. *Fulk v. School District* ..... 630

**Workmen's Compensation.**

1. Mere exertion, which is not greater than that ordinarily incident to the employment, which combined with pre-existing disease produces disability, does not constitute a compensable accidental injury. *Foster v. Atlas Lumber Co.* ..... 129

2. A workmen's compensation case is a civil action equitable in character and so triable by the Supreme Court on appeal. *Peek v. Ayres Auto Supply* .... 233

3. All of the provisions of the Civil Code are applicable and controlling in a workmen's compensation case as they are in any other civil action equitable in nature. *Peek v Ayres Auto Supply* ..... 233
4. The filing of a motion for new trial is not necessary in order to obtain review of a workmen's compensation case upon the merits in the Supreme Court. *Peek v. Ayres Auto Supply* ..... 233
5. The compensation for disability partial in character is sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but the compensation awarded cannot exceed the maximum provided by statute. *Peek v. Ayres Auto Supply* ..... 233
6. Where further medical, hospital, and surgical services would not definitely improve the condition of an injured employee, and where such improvement would be conjectural, the employer's liability to furnish reasonable medical and hospital services and medicines, as and when needed, ceases. *Peek v. Ayres Auto Supply* ..... 233
7. The right of recovery in a workmen's compensation case is statutory. The burden is on the claimant to establish the facts essential to an award. *Rahfeldt v. Swanson* ..... 482
8. An appeal in a workmen's compensation case will be considered by the Supreme Court de novo upon the record. *Rahfeldt v. Swanson* ..... 482
*Myszkowski v. Wilson and Company, Inc.* ..... 714
9. An award of compensation under the workmen's compensation act may not be based on possibilities, probabilities, or conjectural or speculative evidence. *Rahfeldt v. Swanson* ..... 482
10. In a workmen's compensation case if the evidence is in irreconcilable conflict the Supreme Court may upon a trial de novo consider the fact that the district court gave credence to testimony of some witnesses rather than contradictory testimony of other witnesses. *Rahfeldt v. Swanson* ..... 482
11. In a workmen's compensation case the insurance carrier is bound by a judgment against the insured whether the carrier is a party to the action or not. *Ramsey v. Kramer Motors, Inc.* ..... 584
12. Under workmen's compensation law, insurance carrier is a proper party defendant in an action to recover benefits. *Ramsey v. Kramer Motors, Inc.* .... 584

13. Any citizen called into service by a sheriff who receives an injury which arises out of and in the course of the employment is entitled to compensation under the provisions of the workmen's compensation law. *Anderson v. Bituminous Casualty Co.* ..... 590
14. Where an employer appeals to the Supreme Court from an award of the district court in a workmen's compensation case and fails to obtain any reduction in the amount of such award, the Supreme Court should allow the employee a reasonable sum for attorney's fee for the proceedings in the Supreme Court. *Anderson v. Bituminous Casualty Co.* ..... 590
15. To permit an award of compensation under the Second Injury Fund a claimant must in fact have a permanent total disability. *Franzen v. Blakley* 621
16. The Nebraska Workmen's Compensation Act is to be construed liberally so that its beneficent purposes may not be thwarted by technical refinement of interpretation. *Franzen v. Blakley* ..... 621
17. For workmen's compensation purposes, total disability does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. *Franzen v. Blakley* ..... 621
18. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law. *Franzen v. Blakley* ..... 621
19. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted. *Franzen v. Blakley* ..... 621
20. The right to tax attorney's fees in compensation cases is purely statutory. No other authority to allow an attorney's fee is authorized. *Franzen v. Blakley* ..... 621

21. Statute authorizing attorney's fee relates to an "employer" appealing and failing to reduce the amount of the award and to the taxing of an attorney's fee as costs against the "employer." *Franzen v. Blakley* ..... 621
22. An employee is entitled to recover compensation under the workmen's compensation law when he suffers injury as the result of an accident arising out of and in the course of his employment. *Myszkowski v. Wilson and Company, Inc.* ..... 714
23. The burden is upon the employee to establish a right of recovery by a preponderance of the evidence. *Myszkowski v. Wilson and Company, Inc.* 714
24. There must be a causal connection between the employment and the injury before recovery can be allowed. *Myszkowski v. Wilson and Company, Inc.* 714
25. Whether an accident arises out of and in the course of employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. *Myszkowski v. Wilson and Company, Inc.* ..... 714
26. Under the Workmen's Compensation Act the words "arising in the course of the employment" relate to the time, place, and circumstances under which an accidental injury occurs, and the term "arising out of the employment" refers to the origin or cause of the accidental injury. *Myszkowski v. Wilson and Company, Inc.* ..... 714
27. An assault is an "accident" within the meaning of the Workmen's Compensation Act when from the point of view of the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another. *Myszkowski v. Wilson and Company, Inc.* ..... 714
28. Where the peculiar conditions of the employment are such as to expose a worker to a wrongful act by another worker, such an act may reasonably be said to "arise out of the employment." *Myszkowski v. Wilson and Company, Inc.* ..... 714
29. Where a disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment. *Myszkowski v. Wilson and Company, Inc.* ..... 714